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No. 00-___

IN THE

Supreme Court of the United States

KARUK TRIBE OF CALIFORNIA, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Indians of reservations established by express statutory authorization, the locations of which were determined by delegation to the Executive, have a compensable interest in reservation property under the Fifth Amendment such that it may not be taken by the government without payment of just compensation.

PARTIES TO THE PROCEEDING

Petitioners are Karuk Tribe of California; Yurok Indian Tribe; and Carol McConnell Ammon, Leslie Ammon, Elsie McCovey Bacon, Julia Lauretta Bartow, Ollie Roberts Foseide, Bonita Bacon Green, Janice M. Green, Dorothy Williams Haberman, Richard L. Haberman, Evelina Hoffman, Mary Gist Jackson, Martin Kinder, Sr., Rachel L. Knight, Ernest Lewis, Jr., Annie Mitchell Love, Ardith McConnell, Michael McConnell, Robert B. McConnell, Walter C. McKinnon, Thelma W. McLaughlin, Steven J. Metcalfe, Edward E. Mitchell, Veta Gillespie Mitchell, Gertrude V. Mollier, Edward Moore, David E. O'Neill, Herbert L. O'Neill, Barbara E. Orcutt, Lawrence E. Orcutt, David Eric Severns, Maria E. Tripp, and Kathryn Ichelson Wild, as members of, and on behalf of all other members of, an identifiable group of American Indians, consisting of California Indians who occupy or have occupied or are descendants of California Indians who occupy or have occupied the Hoopa Valley Reservation in the State of California, and who do not meet the requirements for membership in the Hoopa Valley Tribe organized in 1950.

Respondents are United States of America and The Hoopa Valley Tribe of Indians.

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No. 00-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

KARUK TRIBE OF CALIFORNIA, *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, together with the dissenting opinion of Circuit Judge Pauline Newman, is reported at 209 F.3d 1366 (Fed. Cir. 2000), and is set forth in the Appendix ("App.") at 1a-37a. The opinion of the Court of Federal Claims is reported at 41 Fed. Cl. 468 (Fed. Cl. 1998), and is set forth in the Appendix at 38a-56a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 18, 2000. Rehearing was denied on July 24, 2000. Appendix at 57a-59a. On October 4, 2000, the Chief Justice

extended the time for filing this petition to and including November 21, 2000. On November 14, 2000, the Chief Justice further extended the time for filing this petition to and including December 21, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND EXECUTIVE ORDERS INVOLVED

U.S. Const. art. IV, § 3, cl. 2 [Property Clause]

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .

U.S. Const. amend. V [Takings Clause]

> . . . nor shall private property be taken for public use, without just compensation.

Act of April 8, 1864, 13 Stat. 39 (App. at 60a-62a)

> . . . there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended . . . .

Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. §§ 1300i-1 *et seq.* (App. at 66a-89a)

Executive Order of June 23, 1876 (App. at 64a)

Executive Order of October 16, 1891 (App. at 64a-65a)

I. STATEMENT OF THE CASE

A. Introduction

The present case is possibly the most important Indian-lands takings case to come before the federal courts in this generation. The majority below held that Indians of a major and widespread category of reservations - those authorized by statute but whose locations were determined by executive order - do not ordinarily have a compensable interest in their reservations, no matter how many generations of Indians have lived on the reservations, no matter how inequitable this result is to Indians whose ancestors gave way to the incursions of Western society in return for the promise of their right to occupy their reservations, and no matter how clear it is that both the government and the Indians acted on the understanding that the reservations were held by the government for the benefit of the Indians. Judge Pauline Newman sharply dissented from the majority's ruling.

This case arises from the enactment in 1988 of the Hoopa-Yurok Settlement Act ("HYSA"), 25 U.S.C. §§ 1300i-1 *et seq.*, which partitioned the Hoopa Valley Indian Reservation (the "Reservation") in California and bestowed its largest and by far most valuable part on a well-organized minority of the Reservation's Indians. The other Indians of the Reservation - dispossessed of their interest in a Reservation they and their ancestors had occupied for over a century - sued for just compensation under the Fifth Amendment.

The implications of the ruling of the majority below are far-reaching. The Federal Circuit has exclusive jurisdiction over Indian-lands takings cases. Unless reversed, the rule it ordains will stand as the last word on the compensability of an important category of Indian reservations.

Indians of treaty reservations are the beneficial owners of the land and resources, and it is well established that their interests in their reservations are protected by the Fifth Amendment. *See* discussion *infra* at 11-12. Property rights of Indians in reservations fully delimited by statute,

like rights in treaty reservations, are also constitutionally protected. *Id.* The present case involves a large and important third category: reservations established by Congress, but at geographic locations fixed by the Executive pursuant to delegated authority.[1]

The rule adopted by the majority below is a harsh one, and it is inconsistent with this Court's jurisprudence and erroneous. In a strongly worded dissent, Circuit Judge Newman wrote, "It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment ... [This] is a case of first impression; and [the majority's] holding is incorrect as well as unjust." App. at 25a, 209 F.3d at 1380.

B. Historical Background

1. Before 1871, most Indian reservations were established by treaties negotiated with the affected tribes,

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[1] There are many such reservations. According to a report prepared on behalf of the United States government for the court in *United States v. Idaho*, 95 F. Supp. 2d 1094 (D. Idaho 1998), *aff'd*, 210 F.3d 1067 (9th Cir. 2000), *cert. granted* (U.S. Dec. 11, 2000) (No. 00-189), from 1855 to 1918 there were 187 executive orders issued to define or modify the boundaries of reservations that continue to exist. App. at 96a. Of these, the report found that 126 were issued pursuant to Congressional authority. *Id.* In some cases, more than one executive order affected a given reservation. (The Mission reservations, which are many in number but of small size, were excluded from the study.) The President's delegated authority to alter the boundaries of Indian reservations was terminated by Congress in 1927. 44 Stat. 1347 (1927), 25 U.S.C. § 398a-398e, discussed *infra*. Accordingly, all reservations of the type held by the Federal Circuit in this case to be non-compensable have been in existence for a number of generations.

Although there are many reservations of the kind involved here, petitioners are aware of no other case that squarely addresses a claim for just compensation based on a governmental taking of reservation property at such a reservation. Thus, this case permits a definitive ruling as to compensability which can inform the conduct of government in future dispositions of reservation property.

and such treaties specifically identified the geographic locations of the territory reserved. *See generally* 2 Kappler, *Indian Affairs: Laws and Treaties* (1904); F. Prucha, *American Indian Treaties* (1994). In accordance with this practice, in 1851 and 1852 eighteen treaties were negotiated with the Indians of California designating specific areas throughout the State as permanent reservations for them. However, the United States Senate declined to ratify these treaties, in part because of the concern that substantial gold deposits might be found in some of the areas designated for reservations. In subsequent years, the influx of gold-seekers throughout the State increased to such extent that there was extreme tension between them and the Indian population. This situation made it imperative that, in lieu of treaties, another way be found to provide the California Indians with permanent reservations in areas where they would be as secure from white encroachment as possible. Congress acted to create such reservations by the passage of the Act of April 8, 1864, the seminal event in the history of this case.[2] This Act mandated that:

> . . . there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended . . .

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[2] In 1871, Congress ended the practice of establishing reservations through treaty negotiations with individual tribes and, thereafter, established reservations either by statute or executive order with the executive branch effectuating congressional policy. Appropriations Act of March 3, 1871, ch. 120 § 1, 16 Stat. 544, 566 (codified as carried forward at 25 U.S.C § 71); *see* F. Cohen, *Handbook Of Federal Indian Law* 477 (2d ed. 1982) ("*Handbook*").

The 1864 Act further granted the President authority to "enlarge" such reservations as he deemed "necessary" to achieve the statute's purpose of accommodating the Indians and serving their "best interests." 13 Stat. 39, App. at 60a. Because there were many Indian tribal and ethnic groups in California at the time, the four-reservation maximum necessarily required that these reservations be multi-ethnic and multi-tribal.

Shortly after the passage of the 1864 Act, the Superintendent for Indian Affairs in California identified a tract of land in Northern California to be set aside as a reservation under the Act, though the President did not formally locate the Reservation there until June 23, 1876. On that date, President Ulysses S. Grant signed an executive order defining the "Hoopa Valley Reservation" – a 12 mile by 12 mile tract generally referred to as the "Square." App. at 64a. As indicated in the 1864 Act, this Reservation was set apart for the "accommodation" of whatever tribal groups and individual Indians the government could induce to reside there. *Short v. United States*, 486 F.2d 561 (Ct. Cl. 1973).

In 1891, the President, as expressly authorized in the 1864 Act, expanded the Reservation. Specifically, by executive order, President Harrison extended the Reservation to include a strip of land along the Klamath River that had been known as the Klamath River Reservation as well as an additional strip of land along the river connecting that tract to the Square.[3] App. at 64a-65a. *See Mattz v. Arnett*, 412 U.S. 481, 493-94 (1973). As an economic matter, the "Square" is rich in timber and other resources, while the "Extension" is much smaller and poorer.

2. The protracted litigation on the part of a majority of the Reservation's Indians to secure an equal distribution of revenues derived from the Square forms the backdrop to the present case. For the first 75 years of its

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[3] This Court specifically affirmed the legality of the 1891 Executive Order expanding the Hoopa Valley Reservation in *Donnelly v. United States*, 228 U.S. 243 (1913).

existence, the Reservation was a multi-ethnic and multi-tribal reservation with no federally recognized tribal organization. In 1950, a minority (approximately thirty percent) of the Reservation's Indians, principally ethnic Hoopas, organized themselves as the "Hoopa Valley Tribe" and achieved recognition by the Bureau of Indian Affairs. In the 1950s, the Bureau of Indian Affairs commenced logging on lands within the Square. In 1955 the Bureau began distributing the profits from these logging operations exclusively to the Hoopa Valley Tribe and its members.

Indians of the Reservation excluded from membership in the Hoopa Valley Tribe sued the United States to obtain their rightful share of revenues from the Reservation. After more than two decades, they prevailed. The courts held that the Reservation as defined in the executive orders of 1876 and 1891 constituted a single indivisible reservation and that all Indians of the Reservation (not merely the members of the Hoopa Valley Tribe) were eligible to share equally in revenues derived from its resources. *See Short v. United States,* 486 F.2d 561 (op. only), 202 Ct. Cl. 870 (op. and findings) (1973) (per curiam), *cert. denied,* 416 U.S. 961 (1974) (*"Short I"*); *Short v. United States,* 661 F.2d 150 (Ct. Cl. 1981) (en banc), *cert. denied,* 455 U.S. 1034 (1982) (*"Short II"*); *Short v. United States,* 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied,* 467 U.S. 1256 (1984) (*"Short III"*); *Short v. United States,* 12 Cl. Ct. 36 (1987) (*"Short IV"*); *Short v. United States,* 25 Cl. Ct. 722 (1992) (*"Short V"*); *Short v. United States,* 28 Fed. Cl. 590 (1993) (*"Short VI"*); *Short v. United States,* 50 F.3d 994 (Fed. Cir. 1995) (*"Short VII"*). The courts held that all Indians of the Reservation had equal ownership interests in the Reservation and its resources. *Short VII* at 996-97.

The Hoopa Valley Tribe responded to this holding by seeking its reversal by Congress. One of the last enactments of the 100th Congress was the HYSA, which divided the Reservation into two parts: a new reservation bearing the same name as the old one but limited to the resource-rich Square, and a second reservation, called the Yurok Indian Reservation, which is coextensive with the Extension. Rights to the Square and its resources were limited to enrolled members of the Hoopa Valley Tribe. The effect of the

partition was to give the Reservation's most valuable lands exclusively to a group, organized generations after the Reservation was established, that the courts had found was not entitled exclusively to benefit from the revenues from those lands.

C. Procedural History

The HYSA specifically contemplated that some affected parties might deem the Act a Fifth Amendment taking, and provided jurisdiction for such claims in the Court of Federal Claims. 25 U.S.C. § 1300i-5. Three such Fifth Amendment claims were filed: by the "Ammon Group," a group comprising the same Indians of the Reservation who had prevailed in the Short litigation - those excluded from membership in the Hoopa Valley Tribe; by the Yurok Tribe, a tribe organized in a manner mandated by the Act to govern the newly created Yurok Indian Reservation; and by the Karuk Tribe, a federally recognized tribe of Indians of the upper Klamath River who claim an interest in the Reservation.

The Court of Federal Claims consolidated the three cases, permitted the Hoopa Valley Tribe to intervene as a defendant, and granted the defendants' cross-motion for summary judgment. App. at 40a. According to the Court of Federal Claims, plaintiffs (petitioners) did not possess a "vested" property interest in the Reservation and thus were not entitled to compensation for their lost lands and timber income. *Karuk Tribe of California, Carol Ammon, et al., & Yurok Indian Tribe v. United States et al.*, 41 Fed. Cl. 468 (Fed. Cl. 1998), App. at 38a-56a.

A divided panel of the Federal Circuit affirmed. *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), App. at 1a-37a.[4] Citing this Court's decisions in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272

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[4] In the official reporter, the caption of the case is erroneously styled as *Karuk Tribe of California v. Ammon*. However, because the case was brought by the Karuk Tribe, the Yurok Tribe and the Ammon group, the case should properly have been styled as *Karuk Tribe of California et al. v. United States et al.*

(1955), *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), and *Sioux Tribe v. United States*, 316 U.S. 317 (1942), the panel majority held that petitioners were mere tenants at will (enjoying only a "permissive right of occupancy") on the lands of the Reservation. The majority found no language in the statute explicitly "vesting" permanent property rights in a reservation and concluded that the Indians of the Reservation had no compensable rights in Reservation lands.

In the majority's view, the question of compensability depended in large part on the fact that Congress had delegated to the Executive the power to fix the Reservation's location and boundaries rather than exercising this power directly. The majority stressed statutory language leaving the precise number and boundaries of California Indian reservations to the discretion of the President.[5] According to the panel majority, "specific granting language" – absent from a statutory scheme in which reservation boundaries were fixed by delegation rather than direct congressional disposition – would be required to "recognize[] compensable property rights." App. at 18a, 209 F.3d at 1377.

The panel majority held that neither the Executive's century-long administration of the Reservation as a duly established permanent reservation, nor repeated congressional acts of authorization and ratification, gave rise to compensable rights. App. at 17a, 209 F.3d at 1376 ("the 'permanent' status of a reservation . . . does [not] grant any permanent rights. . ."). The panel rejected arguments, based on the Mineral Leasing Act of 1927 and other statutes, that the compensability of a duly established Indian reservation does not depend on whether its origins are traceable to treaty, statute, executive order, or a combination of these. App. at 21a-22a, 209 F.3d at 1380. The Indians' continuous and undisturbed use and occupancy of the Reservation, and

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[5] The majority also found significance in statutory language providing that the reservations were "to be retained by the United States." App. at 13a, 209 F.3d at 1371. As the dissent emphasizes, the quoted words form part of the phrase "to be retained by the United States *for purposes of Indian reservations.*" 13 Stat. 39 (emphasis supplied). *See* discussion of dissent, *infra.*

appropriations evidencing "'repeated recognition of the reservation status of the land,'" App. at 18a, 209 F.3d at 1377 (quoting *Mattz v. Arnett*, 412 U.S. at 505), were likewise found insufficient. The majority also rejected arguments that the Indians of California had in effect paid for the Reservation when Congress reduced the amount otherwise payable to them in settlement of certain Indian land claims by an amount that included the value of their reservation lands. *See* Act of May 18, 1928, 45 Stat. 602 (codified as amended at 25 U.S.C. §§ 651 *et seq.*) (Indians of California jurisdictional act); *Indians of California*, 102 Ct. Cl. 837 (1944) (entering judgment on stipulation and identifying offsets). *See also* Act of August 25, 1969, Pub. L. No. 91-64, 83 Stat. 105 (codified as amended at 25 U.S.C. § 661) (adjusting offset). In summary, the court ruled that petitioners' interest in the Reservation was legally indistinguishable from the non-compensable interest of Indians in lands held solely on account of aboriginal use and occupancy.

Circuit Judge Newman dissented. In Judge Newman's view, the relevant acts of Congress and the executive branch as well as the Indians' "unchallenged possession" of the Reservation "for over a century . . . created property interests within the cognizance of the Fifth Amendment." App. at 27a, 209 F.3d at 1381. As Judge Newman pointed out, the fact that the 1864 statute stated that the land in question would be "retained by the United States for purposes of Indian reservations" did not undercut the Indians' Fifth Amendment claims. App. at 27a-29a, 209 F.3d at 1382-83. After all, the United States almost always retains title to reservation lands, including the lands within treaty or statutory reservations that are compensable under the Fifth Amendment. Furthermore, the dissent emphasized that Fifth Amendment rights are not limited to titular ownership. App. at 29a-34a (citing, *inter alia*, *Shoshone Tribe v. United States*, 299 U.S. 476, 496 (1937) (beneficial interest in reservation trust property); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (leasehold); *Shelden v. United States*, 7 F.3d 1022 (Fed. Cir. 1993) (security interest)). In the view of the dissent, under modern understandings of what

constitutes property, including beneficial interests in trust property, petitioners clearly had a compensable right in the Reservation.

II. REASONS FOR GRANTING THE WRIT

In the proceedings below, the Federal Circuit decided "an important question of federal law that has not been, but should be, settled" by the Supreme Court. The Federal Circuit's ruling, moreover, purports to be an interpretation of this Court's precedents. Certiorari is warranted to correct an otherwise uncorrectable distortion of this Court's jurisprudence that casts into doubt the property rights of many reservation Indians throughout the United States and which defies the broad definition that this Court has given to the concept of property in other contexts. This is a matter of great significance not only for the Indians, but also for the United States in its endeavor to act honorably in its relationship with its Indian citizens.[6] As such, it is a paradigmatic case for Supreme Court review.[7]

The question of whether reservations geographically delimited by executive order pursuant to statutory authority give rise to compensable property rights under the Fifth Amendment falls in a gap between two constitutional doctrines. It is settled that the Fifth Amendment protects

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[6] At the time the government was taking the position in this case that petitioners had no compensable interest in the Reservation, it was actually taking an inconsistent position in another case in which it argued that Congress, in the General Allotment Act of 1887, 25 U.S.C. § 331, specifically intended to elevate *all* reservations whose creation involved executive orders to the same status as reservations fully defined by statute or treaty. United States' Post-Trial Brief in *United States v. Idaho*, *supra* note 1, App. at 101a-120a.

[7] Although this Court sometimes will defer review of novel legal issues until such issues "percolate" in the lower courts or result in a division among the lower courts, no such deferral is appropriate in this case. Here, the Federal Circuit has spoken definitively on a question of law within its exclusive purview. If the petition is not granted, the important rule established by the decision below will not be subject to review by any Court of Appeals.

Indians on reservations fully defined by statute or treaty from the taking of their lands without the payment of just compensation. As this Court held more than sixty years ago:

> Power to control and manage property and affairs of Indians in good faith for their betterment and welfare may be extended in many ways ... [citation omitted] (but) the power does not extend so far as to enable the Government "to give the tribal lands to others, or appropriate them for its own use, without rendering, or assuming an obligation to render just compensation ... for that would not be an exercise of guardianship, but an act of confiscation." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935), *citing Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308 (1902).

Shoshone Tribe v. United States, 299 U.S. at 497; *accord United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

At the same time, this Court has held that Indians do not have compensable rights where their interest in the land in question is based solely on aboriginal use and occupancy nowhere recognized by the United States. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). The *Tee-Hit-Ton* Court declared that congressional recognition of a "right of permanent occupancy" (which would be compensable) might be established "in a variety of ways," but the total absence of congressional recognition, either implicit or explicit, left the Indians without Fifth Amendment protection. *Id.* at 278.

This Court has also held that two reservations established by executive order without statutory authorization and intended for specific temporary purposes could be abolished without the payment of just compensation. In the lead case, *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), executive orders issued in 1875 and 1876 had added certain lands to the Sioux Reservation specifically in order to combat liquor sales to

Indians in the area of the added lands. When federal law changed to ban liquor sales to Indians even outside of reservation boundaries, the President issued new executive orders in 1879 and 1884 removing the added lands from the Reservation. This Court found this diminution of the Reservation to be non-compensable. As this Court emphasized, Section 3 of Article IV of the Constitution vests in Congress the exclusive power to dispose of property belonging to the United States. Accordingly, "the executive's power to convey any [compensable] interest in these lands must be traced to a Congressional delegation of its authority." *Sioux Tribe*, 316 U.S. at 325-26. The executive orders in *Sioux Tribe* involved no such delegation.

Subsequently, in *Confederated Bands of Ute Indians v. United States*, this Court applied *Sioux Tribe* to find no taking of a compensable interest where an 1880 executive order re-opened lands set aside for the Ute by an 1875 executive order intended to temporarily ameliorate the consequences of an inaccurate survey of the tribe's reservation boundary. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947).

The Federal Circuit ruling places petitioners' property rights in a reservation established as their permanent home pursuant to a specific statutory mandate in the *Tee-Hit-Ton/Sioux Tribe* category of non-compensable interests. This holding ignores the clear and deep parallels between the property rights of Indians in statutorily authorized reservations designated by executive order and rights of Indians in the statutory and treaty reservations that this Court long ago held to be compensable. Furthermore, it patently misconstrues this Court's precedents to create a threshold for establishing compensable rights that has no basis in law, history, the relationship between Indians and the United States, or fundamental notions of what constitutes a right in property.

Reservations created pursuant to statute, even when their boundaries were determined by delegation to the executive branch, especially those that survived into the modern era, bear all the hallmarks of compensability found in reservations fully defined by statute or treaty. As with

treaty reservations and other statutory reservations, these reservations trace their existence to an exercise of Congress's authority under Section 3, Article IV of the Constitution. As with treaty reservations and other statutory reservations, these reservations were established as permanent homelands for Indians in exchange for peace and the relinquishment of aboriginal claims to greater territory. As with treaty reservations and other statutory reservations, these reservations have actually served as such permanent homes.

In deciding Fifth Amendment takings claims by Indians living on reservations created by treaty, this Court has held that, while ultimate title to such reservations resides in the United States, these treaty-reservation Indians possess compensable property rights because they were granted a "right to occupancy with all its beneficial incidents." *Shoshone Tribe*, 299 U.S. at 496. Indians living on century-old reservations established by statute but geographically defined through executive order enjoy precisely this same right to occupancy and all beneficial incidents. In other words, the nature of the rights granted Indians on treaty reservations and Indians living on the type of reservation at issue here are identical. Accordingly, there is no reasonable basis for distinguishing between them for the purpose of determining compensability under the Fifth Amendment.

The facts of the instant case powerfully illustrate the argument in favor of finding compensable interests in such reservations. The 1864 Act specifically required the President to establish up to four California reservations as the permanent homes for California's many indigenous peoples. It should be of no legal consequence for the purposes of the Fifth Amendment that the statute, rather than defining the boundaries of the Reservation directly, delegated that responsibility to the President. As the authoritative *Handbook of Federal Indian Law* concludes, this kind of statutory delegation was routine and should make no difference. *Handbook* at 477-78, 485. Indeed, *Sioux Tribe*, on which the Federal Circuit relies, explicitly states that the President may confer compensable property rights through a delegation of Congress's Article IV authority. *Sioux Tribe*, 316 U.S. at 326.

More generally, the United States has treated these executive order reservations as the legal equivalent of statutory and treaty reservations in both law and deed. For example, Section 1 of the General Allotment Act of 1887, 25 U.S.C. § 331, is clearly premised on Congress's recognition of the equivalent legal status of statutory, treaty, and executive order reservations (even ones without statutory mandates)[8]; and, indeed, as recently as 1998, the Department of Justice argued to a federal district court that Congress, in the Allotment Act, specifically intended to elevate all executive order reservations to the full recognized status of statutory and treaty reservations. *See* note 6, *supra*. *See also Handbook* at 495-97 (in Allotment Act and other statutes, Congress "acted affirmatively to assure that executive order reservations are treated like all other tribal lands.").

Similarly, in 1927, Congress passed legislation directing that oil and gas revenues from executive order reservations be held for the benefit of the tribes of those reservations and also prohibited the President from altering the boundaries of such reservations without explicit congressional approval. 44 Stat. 1347 (1927), 25 U.S.C. § 398a-398e. The legislative history shows that both supporters and opponents understood these provisions to constitute full congressional recognition of executive order reservations. *"Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right,"* 69 Yale L.J. 627, 631-37 (1960). Subsequent Congresses, moreover, implicitly ratified this understanding. After 1927, Congress consistently provided compensation whenever it confiscated lands in executive order reservations. *Handbook* at 496-97.

Furthermore, from the moment the Reservation was established, the United States and the resident Indians

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[8] Section 1 provides: "That in all cases where any tribe or band of Indians has been, or shall hereafter be located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and hereby is, authorized . . . to cause . . . to be surveyed . . . and to allot the lands in said reservation in severalty to any Indian located thereon."

treated the Reservation as the Indians' homeland. For decades, the United States managed the Reservation's assets for the benefit of the Indians of the Reservation and, indeed, was under a legal obligation as trustee to do so prudently. *Mitchell v. United States*, 463 U.S. 206 (1983); *Short III*, 719 F.2d at 1134. In addition, beginning in the 1890s, the Reservation was subject to allotment on the same terms as statutory and treaty reservations generally. *See Mattz v. Arnett*, 412 U.S. at 494-95. From time to time, Congress also made appropriations for the Reservation.

According to the respected authors of the *Handbook of Federal Indian Law*, in light of such repeated acts of recognition and ratification, an executive order reservation would qualify as giving rise to compensable property interests regardless of any initiating statutory authority: "If an executive order reservation has been in existence for several decades, there is an increased inference of congressional ratification of the reservation's permanent existence by appropriation of funds and other actions supporting continuous use of the lands for Indian purposes." *Handbook* at 495. Surely, then, when combined with an initial statutory mandate for the establishment of the Reservation, a century of unbroken conformity with the Indians' right to permanent occupancy of their land makes clear the compensable nature of the Indians' interests.

The majority below nevertheless concludes that Indians on statutory reservations such as this one have no greater rights to the land than tenants at will unless the statute contains explicit language vesting property rights in the Indians. This holding fills federal Indian law with perverse ironies. It means, for example, that while the United States has a trust responsibility to manage such reservation resources prudently, it has no obligation to pay compensation for seizing the trust corpus.[9] And it means

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[9] The majority below would effectively nullify the rights established by the *Short* litigation. In that litigation, reservation Indians obtained a substantial judgment based on their right to a fair share of the Hoopa Valley Reservation's resources. *Short VII*, 50 F.3d 994. In this case, the Federal Circuit has declared that those Indians had no compensable rights whatsoever in those resources.

that Indians can be the beneficiaries of a hundred years of settled understanding as to their permanent home only to be dispossessed without a cent of compensation because in 1864 Congress saw fit to give the President flexibility as to the boundaries to be given California's reservations rather than fixing those boundaries itself.

The majority's holding is the product of significant misreadings and unwarranted extensions of this Court's precedents. The Federal Circuit's substantial reliance on *Tee-Hit-Ton* is misplaced. *Tee-Hit-Ton* involved the compensability of aboriginal lands with no basis in statute or executive order and cannot reasonably be read to govern this case.[10] Furthermore, insofar as the Federal Circuit purports to derive from *Tee-Hit-Ton* its rule that "[r]ights of occupancy, however, do not constitute compensable property interests unless specifically recognized by an Act of Congress," 348 U.S. at 289, the Court has transformed what this Court actually held. The cited passage in *Tee-Hit-Ton* actually states only that "Indian occupancy not specifically recognized as ownership by action authorized by Congress may be extinguished by the Government without compensation." Thus, the Federal Circuit has changed a holding under which taking of lands in a statutorily authorized executive order reservation would have to be compensated (because the executive order was an "action authorized by Congress") into a new legal rule under which such a taking would not require compensation.[11]

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[10] Even aside from the obvious distinction that the instant case involves a permanent statutory reservation and *Tee-Hit-Ton* did not, an examination of the specific claim in *Tee-Hit-Ton* underscores the dramatic differences between the cases. In *Tee-Hit-Ton*, Alaska natives sued the United States for removing timber from lands claimed by the natives on the basis of historical use and occupancy. Here, by contrast, it is already well-established in law that the United States was obligated to manage the timber resources of the Reservation for the benefit of the Indians.

[11] The Federal Circuit also cites *Tee-Hit-Ton* in connection with its holding that, because the 1864 Act stated that the lands of the California reservations were "to be retained by the United States for purposes of an Indian reservation," that Act could not constitute a Congressional

The Federal Circuit's reliance on *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), further distorts this Court's jurisprudence. *Hynes* was an action by canning companies in Alaska to enjoin enforcement of regulations prohibiting commercial fishing in the waters of the Karluk Reservation. The crucial issue in *Hynes* was whether the Secretary of Interior had sufficient statutory authority to set aside certain valuable tidewaters as part of the Karluk Reservation. This Court held that the Secretary did, in fact, have such authority, although certain fishing regulations he had promulgated were not statutorily authorized. Accordingly, *Hynes* cannot plausibly be read as deciding the issue of whether executive orders establishing a reservation that were indisputably authorized by statute can create a compensable interest in a Fifth Amendment taking claim against the United States.

Indeed, to the extent *Hynes* is instructive for the purposes of this case, its jurisprudential approach is at odds with the approach of the Federal Circuit. *Hynes* expressly states that when a reservation is established by statute "the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action." *Id.* at 103. It is incontrovertible that the purpose of the 1864 Act, confirmed by more than a century of history thereafter, was to set aside permanent homes for the Indians of California, and its language is plainly consistent with this purpose.

In support of the proposition that beneficial interests in reservations such as the Hoopa Valley Reservation are not compensable, the panel majority looks to certain Presidential orders issued in the late 19th century, discussed in this Court's 1913 decision in *Donnelly v. United States*, that modified and sometimes reduced the acreage of reservations in California. App. at 14a-15a, 209 F.3d at 1376 (citing

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recognition of Indian property rights. App. at 11a-12a, 14a. As observed by the dissent, however, the United States retains ultimate title in Indian tribal lands in general - including those statutory and treaty reservation lands this Court has repeatedly found to enjoy Fifth Amendment protection. *See* discussion and citations *supra* at 10.

Donnelly, 228 U.S. at 256-57). *Donnelly*, in which this Court affirmed the legality of the 1891 executive order adding the "Extension" to the Reservation, certainly stands for no such proposition. The fact that the Executive diminished some reservations before the practice was barred in 1927 does not answer the question raised in this case: whether the diminution of a reservation mandated by statute as a homeland for Indians involves the taking of a compensable property interest.

The Federal Circuit's reliance on the *Sioux Tribe* line of cases is also misplaced. The executive order reservations in *Sioux Tribe* and *Confederated Bands of Ute* were, by design, temporary additions to permanent reservations with neither prior congressional authorization nor subsequent congressional ratifications (either express or implied). This Court recognized that the President has the power to restore such temporarily reserved lands to the public domain, and it found such restorations not to infringe constitutionally protected property rights. This is hardly surprising. In such situations, Congress never exercised its Article IV, § 3 powers to dispose of property belonging to the United States. The rule applicable to such short-term withdrawals of land from the public domain has no bearing on reservations established pursuant to statute, the specific boundaries of which were established by delegation to the Executive, and which were thereafter held by the Indians for generations with every indicia of permanence.

Two more general considerations further underscore both the fundamental error of the majority decision below and its larger import. First, the ruling ignores the underlying trust relationship between the United States and Native American peoples. It is well-settled that because the United States serves as guardian to its indigenous tribes, transactions between the government and Indians are to be construed so as to resolve reasonable doubts, if any, in favor of the Indians. *See, e.g., United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938). *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999). Only by disregarding this basic principle could the Federal Circuit possibly conclude that a reservation mandated by statute, defined by two executive orders, and operational for a

century as the Indians' permanent home did not vest some compensable property right in its residents.

Second, the decision of the majority below is, as the dissent bluntly puts it, "unjust." More than one hundred years ago the ancestors of petitioners and other similarly situated Indians were dispossessed of most of their lands, having been confronted by a superior military force from an economically more powerful society. In return for abandoning their resistance to its incursions, that society gave them their reservations. Nonetheless, the government took the position below that, whatever the Indians may have thought, and whatever its own conduct may have been, the Indians had but a "temporary" right of occupancy, subject to divestment without just compensation.

As emphasized by the dissent, the Federal Circuit ruling is at odds with the modern trend in property law, including this Court's jurisprudence, which uses as its touchstone equitable notions of "justice and fairness" in determining when property rights have been seized. *See* dissenting opinion below, App. at 29a-30a, citing such cases as *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Hodel v. Irving*, 481 U.S. 704 (1987); and *Andrus v. Allard*, 444 U.S. 51, 65 (1979). This case thus presents the question of whether and to what degree this Court's jurisprudence of "justice and fairness" applies equally to the separate but related question of the existence and nature of compensable property interests. *Cf. Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (ex-President had a compensable property interest in presidential papers created during his administration). In *Nixon* the Court of Appeals based its decision on the principle that the "essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." *Id.* at 1276 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979)). Thus, property interests derive from "mutually reinforcing understandings [that] can arise in myriad ways." *Id.* From a review of the history of the use, control and disposition of presidential papers it determined that Mr. Nixon had "a well-grounded expectation of ownership." *Id.* at 1270. The same is true of the Indians here.

The modern approach brings a flexible and equitable concern for justice and fairness to the issue of whether a compensable interest for Fifth Amendment purposes has arisen. It cannot be reconciled with the wooden and mechanical search for language of "vesting" adopted by the Federal Circuit majority in this case.

III. CONCLUSION

For the reasons stated above, petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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December 15, 2000

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APPENDIX A

United States Court of Appeals for the Federal Circuit

99-5002,-5003,-5006

KARUK TRIBE OF CALIFORNIA,

Plaintiff-Appellant,

v.

CAROL MCCONNELL AMMON, LESLIE AMMON, ELSIE McCOVEY BACON, JULIA LAURETTA BARTOW, OLLIE ROBERTS FOSEIDE, BONITA BACON GREEN, JANICE M. GREEN, DOROTHY WILLIAMS HABERMAN, RICHARD L. HABERMAN, EVELINA HOFFMAN, MARY GIST JACKSON, MARTIN KINDER, SR., RACHEL L. KNIGHT, ERNEST LEWIS, JR., ANNIE MITCHELL LOVE, ARDITH MCCONNELL, MICHAEL MCCONNELL, ROBERT B. MCCONNELL, WALTER C. MCKINNON, THELMA W. MCLAUGHLIN, STEVEN J. METCALFE, EDWARD E. MITCHELL, VETA GILLESPIE MITCHELL, GERTRUDE V. MOLLIER, EDWARD MOORE DAVID E. O'NEILL, HERBERT L. O'NEILL, BARBARA E. ORCUTT, LAWRENCE E. ORCUTT, DAVID ERIC SEVERNS, MARIA E. TRIPP, and KATHRYN ICHELSON WILD,

Plaintiffs-Appellants,

and

YUROK INDIAN TRIBE,

Plaintiff-Appellant,

v.

Appendix A

UNITED STATES,

Defendant-Appellee,

and

HOOPA VALLEY TRIBE,

Defendant-Appellee.

Dennis J. Whittlesey, Jackson & Kely, PLLC, of Washington, D.C., argued for plaintiff-appellant, Karuk Tribe of California.

William C. Wunsch, of San Francisco, California, argued for plaintiffs-appellants, Carol McConnell Ammon, et al. Of counsel on the brief was *Martin S. Putnam*, Law Offices of Martin Putnam, of Oakland, California. Of counsel was *Jonathan F. Putnam*, Laws Offices of Martin Putnam.

John R. Shordike, of Alexander & Karshmer, of Berkeley, California, argued for plaintiff-appellant, Yurok Indian Tribe. With him on the brief was *Curtis G. Berkey*.

John A. Bryson, Attorney, Appellate Section, Environment and Natural Resources Division, Department of Justice, of Washington, D.C., argued for defendant-appellee, United States. With him on the brief were *Lois J. Schiffer*, Assistant Attorney General; *Susan V. Cook* and *Thomas L. Halkowski*, Attorneys. Of counsel on the brief was *John Jasper*, Attorney, Office of the Solicitor, U.S. Department of the Interior, of Washington, D.C.

Thomas P. Schlosser, Morisset, Schlosser, Ayer & Jozwiak, of Seattle, Washington, argued for defendant-appellee, Hoopa Valley Tribe. With him on the brief was *K. Allison McGaw*.

Appealed from: United States Court of Federal Claims

Senior Judge Lawrence S. Margolis

DECIDED: April 18, 2000

Before NEWMAN, RADER, and SCHALL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RADER. *Circuit Judge* NEWMAN dissents.

RADER, *Circuit Judge*.

The United States Court of Federal Claims denied the motions for summary judgment filed by the plaintiffs, the Karuk Tribe of California, the Yurok Indian Tribe, and a group of individual Indians led by Carol McConnell Ammon. *See Karuk Tribe of California, Carol Ammon, et al., and Yurok Indian Tribe v. United States and Hoopa Valley Tribe*, 41 Fed. Cl. 468 (Fed. Cl. 1998). At the same time, the trial court granted motions for summary judgment filed by the defendant and the defendant-intervenor, the United States and the Hoopa Valley Tribe. The Court of Federal Claims determined that plaintiffs did not possess a vested, compensable property interest in the Hoopa Valley Indian Reservation. Because the trial court correctly held that plaintiffs never had a compensable property interest the 1988 Hoopa-Yurok Settlement Act did not take any private property of the plaintiffs. Therefore, this court affirms.

I.

This case concerns Indian reservation lands in the northwest corner of California. These lands lie in the Hoopa Valley between the Salmon Mountains and the lower Klamath River. The current Hoopa Valley Reservation is a square comprising about ninety thousand acres, and about

twelve miles long on a side.[1] The Trinity River runs north through the square and joins the Klamath, there flowing southwest, just below the town of Weitchpec on the northern boundary of the square. The Klamath turns abruptly northwest at its junction with the Trinity and runs through groves of Redwood trees into the Pacific Ocean. A strip of land two miles wide on the lower stretch of the Klamath, extending from the boundary of the square to the Pacific Ocean, was, from 1891 to 1988, also part of the reservation - the "addition."

An executive order set aside the square as an original Hoopa Valley Reservation on June 23, 1876. Another executive order added the addition to this reservation in 1891. In 1988, the Hoopa-Yurok Settlement Act severed the addition, making it a reservation for the Yuroks, and established the square as a reservation for the Hoopa Valley Tribe. Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i-1300i-11 (1994) (the Settlement Act). The plaintiffs claim that the Settlement Act took their property interests in the reservations.

A brief historical overview sets this case in perspective. All the parties in this case, other than the United States Government, are Indians. These Indians are now organized into the Karuk, Yurok, and Hoopa Valley Indian Tribes, or are individuals who have not elected to join any of these tribes. The Ammon Group plaintiffs state that they comprise "an identifiable group of California Indians, each of whom has an undivided interest in the Hoopa Valley

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[1] Perhaps owing to faulty surveying, the square had a "dog-leg" in its lower boundary until 1998, when the Hoopa Valley Reservation South Boundary Adjustment Act eliminated the irregularity. *See* Pub. L. 105-79, Nov. 13 1997, 111 Stat. 1527, as amended Pub. L. 105-256, section 6, Oct. 14, 1998, 112 Stat. 1896.

Reservation as it existed before 1988, but who are not eligible for membership in the 'Hoopa Valley Tribe,' organized in 1980." The Karuk, Yurok, and Hoopa Indians share many elements of a common cultural, religious, and economic outlook. *See* A.L. Kroeber, *Handbook of The Indians of California* 6 (Dover ed. 1976) (hereinafter, Kroeber).[2] Historically, the Yuroks resided along the lower Klamath, in what became the addition, while the Karuks resided along the upper Klamath, an area outside any reservation. Yurok means "down the river," while Karuk means "up the river." These names "coincide with the respective homelands." *Mattz v. Arnett*, 412 U.S. 481, 485 (1973) (citing Kroeber in its original edition, Bulletin 78, Bureau of American Ethnology 1-97 (1925); S. Powers, *Tribes of California*, cc. 4 and 5, published as 3 Contributions to North American Ethnology 44-64 (1877), and various Reports of the Commissioner of Indian Affairs, e.g., the *1856 Report of the Commissioner of Indian Affairs* 249-250.) The Hoopa Valley Indians lived in the Hoopa Valley along the Trinity River. Therefore, the square – now the Hoopa Valley Indian Reservation – was historically the homeland of the Hoopas. The addition was the homeland of the Yuroks. Weitchpec, on the square's northern boundary, was originally a Yurok settlement.

On January 24, 1848, when James Marshall saw the sparkle of gold on the South Fork of the American River in northern California, the native population of California was about five times as large as the settler population. By September 4, 1850, when California became the 31st state, the settlers easily outnumbered the natives. *See* Byron Nelson, Jr., *Our Home Forever: A Hupa Tribal History* 47 (1978) (hereinafter, *Hupa*). To relieve the tensions between the stagnant native and the exploding settler populations, the

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[2] Kroeber and some other sources refer to the up-river Indians as "Karok."

United States appointed commissioners in 1851 to negotiate treaties with the California Indians. These commissioners negotiated eighteen treaties with the Indians, setting aside about 7.5 million acres of California land for Indian use. These treaties, however, required ratification by the United States Senate. The Senators from California opposed these treaties. The Senate considered the treaties in secret session, but never ratified them. These treaties were, therefore, always a nullity. Indeed, they were filed away from public view in 1852, and not seen again until 1905.[3]

Meanwhile, settlers attracted to California by gold were succeeded by others attracted by fertile land. Violence erupted amongst miners, farmers, Indians, and the U.S. Army. To quell the violence, Congress authorized the President "to make five military reservations [with no more than twenty-five thousand acres in each] . . . for Indian purposes." Act of March 3, 1853, 10 Stat. 238. The same Act appropriated funds for moving the "Indians in California" to the reservations. *Id.* Under this authority, the United States by executive order established an Indian reservation in 1855 on a strip of land on the lower Klamath River, in Yurok territory. 2 *Executive Orders Relating to In-dian Reservations* 39 (1922). This Klamath River reservation was to "commenc[e] at the Pacific Ocean and extend[] 1 mile in width on each

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[3] Bruce S. Flushman and Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L. J. 409 (1986). In one of these 1851 treaties, the "Poh-lik, or lower Klamath [now Yurok], the Peh-tsick or upper Klamath [now Karuk], and the Hoo-pah or Trinity river Indians" agreed to maintain peace with the United States and with each other, to submit to the "exclusive jurisdiction, authority, and protection of the United States," and to settle upon a reservation. In exchange, the Unites States promised to supply certain reservation services and, *inter alia*, specified numbers of blankets, items of clothing, and farm and cooking implements. *Hupa*, at app. I.

side of the Klamath River . . . with the provision . . . that . . . a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres." *Id.*

The Hoopa refused to move to this reservation. *Hupa*, at 65. Violence between settlers and Indians escalated, and the U.S. Army had to be reinforced. *See Painter v. United States*, 33 Ct. Cl. 114, 1800 WL 2032 (1897). Finally, Congress stepped in again, and on April 8, 1864, authorized the President, "at his discretion," to set apart four tracts of land "to be retained by the United States for purposes of Indian Reservations, which shall be of suitable extent for the accommodation of the Indians of said state." Act of April 8, 1864, 13 Stat. 39 (the 1864 Act).

On August 12, 1864, Austin Wiley, the federal Government's Superintendent of Indian Affairs for the State of California, signed a "[t]reaty of peace and friendship between the United States Government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians." *Hupa*, at 89. This treaty, which was not presented to Congress for ratification, purported to obligate the United States to set aside "for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley." *Id.*

On August 21, 1864, Wiley published at Fort Gaston, in the Hoopa Valley, a proclamation that he had "this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation." 2 *Executive Orders Relating to Indian Reservations* 38. Almost thirteen years later, on June 23, 1876, President Ulysses S. Grant established, under the 1864 Act, the "Hoopa Valley Indian Reservation." *Id.* This executive order defined the boundaries of the square and "set [it] apart for Indian purposes." *Id.* The valuable resources of that parcel of land,

today not gold but timber, give rise to the dispute before this court.

II.

This litigation is the latest attempt by plaintiffs to receive a share of the revenues from timber grown on the square. Since 1950, the Secretary of the Interior has dispersed those revenues only to Indians who were members of the Hoopa Valley Tribe. In fact, the Hoopa Valley Tribe came into existence in 1950 with membership limited to those allotted land on the square, non-landholders voted in by the Tribe, and long-time residents of the square with a prescribed degree of native Hoopa parentage. *See Jessie Short et al. v. United States*, 486 F.2d 561, 562 (Ct. Cl. 1973) (*Short I*). The Hoopas were the only group of the Indians on the reservation organized into a recognized tribe at the time of the initial *Short* litigation (which was not "short" at all). The plaintiffs in *Short I* were primarily Yuroks who had lived on the addition or their descendants, who sought to share in the revenue from Hoopa Valley reservation timber. *See Short v. United States*, 12 Ct. Cl. 36, 40 (1987).

In the *Short* litigation, the United States Court of Claims[4] decided that all Indians who lived anywhere on the reservation (including the addition) were "Indians of the reservation" entitled to share equally in the timber revenues from the square. *Short I* at 568. Later *Short* cases set standards to identify "Indians of the reservation." *See Short*

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[4] In 1982 after the enactment of the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 25, the United States Claims Court assumed cases originally filed in the United States Court of Claims. The United States Claims Court was renamed the United States Court of Federal Claims in Pub.L. No. 102-572, 106 Stat. 4506 (1992).

v. United States, 486 F.2d 561 (Ct. Cl. 1973), 661 F.2d 150 (Ct. Cl. 1981), 719 F.2d 1133 (Fed. Cir. 1983). The Settlement Act nullified the *Short* rulings by establishing a new Hoopa Valley Reservation:

> [T]he area of land known as "the square" . . . shall . . . be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

25 U.S.C. § 1300i-1(b) (1994). A necessary effect of the Settlement Act was thus to assure payment of the timber revenues from the square exclusively to the "Hoopa Valley Tribe."

The Settlement Act also partitioned the Hoopa Valley Reservation into two exclusive parts, the Square, or the Hoopa Valley Reservation, *see id.*, and the Addition, or the Yurok Reservation, *see* 25 U.S.C. § 1300i-1(c). Establishment and transfer of these lands was contingent upon waiver of claims against the United States arising under the Settlement Act by both the Hoopas and Yuroks. *See* 25 U.S.C. §§ 1300i-1(a)(2)(A)(i) & (c)(4). Those not included in these two tribes could either elect membership in one of them, or receive a payment of $15,000. *See* 25 U.S.C. § 1300i-5. The Settlement Act also specified that the Court of Federal Claims would have jurisdiction over any claims asserting the Act to be a taking under the Fifth Amendment. *See* 25 U.S.C. § 1300i-11. The Hoopa accepted the Settlement Act and waived their rights; the Yurok did not.

The Karuk, Yurok, and Ammon Group filed separate complaints in the Court of Federal Claims alleging that the Settlement Act was a taking of their vested property interests in the land and the resources of the Hoopa Valley Reservation. All three groups contend, *inter alia*, that the

1864 Act and later events vested them with compensable rights which the Settlement Act has taken from them. Alternatively, plaintiffs argue that they have compensable rights based on their continuous occupation of lands later incorporated into the Hoopa Valley Reservation. *See Karuk*, 41 Fed. Cl. at 469-70. The Court of Federal Claims consolidated the three cases, *see Karuk Tribe of California v. United States*, 27 Fed. Cl. 429, 433 (1993), and permitted the Hoopa Valley Tribe to intervene as a defendant. *See Karuk Tribe of California v. United States*, 28 Fed. Cl. 694, 698 (1993). The parties conducted discovery and filed cross-motions for summary judgment. *See Karuk*, 41 Fed. Cl. at 470-71. As noted above, the trial court denied plaintiffs' motion for summary judgment and granted summary judgment in favor of the United States, after concluding that the plaintiffs did not possess a vested compensable property interest in the Hoopa Valley Indian Reservation. *See id.* at 477. This appeal followed.

III.

This court has jurisdiction over an appeal from a final judgment of the United States Court of Federal Claims, and reviews a grant of summary judgment independently, construing the facts in a light most favorable to the non-moving party. *See Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed. Cir. 1992). This court upholds summary judgment only when the record shows both no genuine issue of material fact and entitlement of the moving party to judgment as a matter of law. *See* 28 U.S.C. § 1295(a)(3) (1994); *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999). In this case, the pertinent facts are not in dispute. This court reviews issues of statutory interpretation under a *de novo* standard of review. *Kane v. United States*, 43 F.3d 1446, 1448 (Fed. Cir. 1994).

Only Congress can "dispose of and make all needful Rules and Regulations respecting the Territory or other

Property belonging to the United States." U.S. Const. art. IV, § 3. In other words, only an Act of Congress can grant a right of permanent occupancy as opposed to permissive occupancy. But the allocation of rights to land between non-natives and the native population of North America has occasioned much litigation, which has defined the principles which govern the rights granted to Indians by the United States:

1. Indian title, or "right of occupancy," is a right "to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to wander at will in the search for food." *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-339 (1945); *Cramer v. United States*, 261 U.S. 219, 227 (1923).

2. The United States may extinguish Indian title by "purchase or conquest." *Johnson v. M'Intosh*, 8 Wheat. 543, 585-88 (1830).

3. The United States may terminate Indian title – a permissive right of occupancy – "without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946).

4. Permissive occupation does not grant legal rights. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949).

5. An Act granting permanent, rather than permissive, occupancy, must expressly create those rights. *See Tee-Hit-Ton*, 348 U.S. at 278-279. However, "[t]here is no particular form for congressional recognition of Indian right or permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action

or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-79. "When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose." *Hynes*, 377 U.S. at 104. Congressional silence does not delegate the right to create, or acquiesce in the creation of, permanent rights. *See Confederate Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947).

7. The President has no authority to convey any interest in public lands without a clear and definite delegation in an Act of Congress. *See Sioux Tribe v. United States*, 316 U.S. 317, 325 (1942).

8. An Indian reservation created by Executive Order of the President conveys no right of use or occupancy "beyond the pleasure of Congress or the President." *Hynes*, 337 U.S. at 103.

Plaintiffs assert a taking of their alleged property rights in the square. A takings claim calls for a two-step analysis. First, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a "stick in the bundle of property rights." If a plaintiff possesses a compensable property right, a court proceeds to the second step. Under that second step, a court determines whether the governmental action at issue constituted a taking of that "stick." *See M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). The second step of the analysis, an intensely factual inquiry, includes consideration of the character of the governmental action, the economic impact of the action on the claimant, and the reasonable expectations of the claimant. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124. (1978).

Before examining the alleged property deprivation, therefore, this court first examines the nature of the plaintiffs' property rights in the assets of the Hoopa Valley Reservation. The object of this examination is to determine whether plaintiffs in fact had property interests within the meaning of the Fifth Amendment.

IV.

Plaintiffs contend that they have compensable vested rights in the square that spring from the 1864 Act and subsequent events. These rights, if indeed possessed by plaintiffs, would qualify as property under the Fifth Amendment, since the term "property" as used in the Taking Clause includes all rights inhering in ownership, including the right to possess, use, and dispose of the property. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

This court thus examines the nature of the rights granted plaintiffs by the 1864 Act. As already noted, "[w]hen Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose." *Hynes*, 377 U.S. at 104. The 1864 Act lacks language creating a vested interest for Indians. Section 2 of the 1864 Act provides:

> [T]here shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for purposes of Indian reservations, which shall be of suitable extent for accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended . . . .

Most importantly, Section 2 states that the President, "at his discretion," can create up to four tracts of land for reservations. Further on, Section 2 allows the President to enlarge a reservation "as in the opinion of the President may be necessary." As the Supreme Court noted when interpreting the 1864 Act, "[t]he terms of this enactment show that Congress intended to confer a discretionary power." *Donnelly v. United States*, 228 U.S. 243, 256 (1913). In short, the statutory language provides the President with the discretion to create Indian reservations. Further, the 1864 Act states expressly that the United States "retained" the land. Nothing in the language of the 1864 Act demonstrates a "definite intention by congressional action," *Tee-Hit-Ton*, 348 U.S. at 278-79, to create a vested interest in the Indians who would reside on the reservations created under the Act.

When two Presidents exercised their discretion under the 1864 Act, their Executive Orders that created the Hoopa Valley Reservation contained no language expressly vesting rights in the Indians. In his Executive Order of June 23, 1876, creating the initial Square of the Hoopa Valley Reservation, President Ulysses S. Grant simply described the Reservation's bounds and indicated that the reserved land is "withdrawn from public sale and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864." Exec. Order June 23, 1876. The Reservation's extension through an Executive Order of President Benjamin Harrison on October 16, 1891 used similar language, stating that the new land was "set apart for Indian purposes, as one of the Indian reservations authorized" under the 1864 Act. Exec. Order Oct. 16, 1891. Neither Order demonstrates a definite intention by the United States to confer property rights upon the Indians of the Reservation. In addition, as noted in *Hynes*, 337 U.S. at 103, a President may only confer by Executive Order rights that Congress has authorized the

President to confer. Thus, because the 1864 Act itself did not authorize the President to confer a vested interest upon the Indians but "retained" the land, neither President Grant nor President Harrison had authority to create vested Indian rights in the Hoopa Valley Reservation.

The conduct of the United States under the 1864 Act further demonstrates that the Act did not create any compensable property interests for the Indians. As the Supreme Court noted in *Donnelly*,

> [i]t has been seen that Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison, successively, acted with respect to one or more of [the 1864 Act] reservations upon the theory that the act of 1864 conferred a continuing discretion upon the Executive; orders were made for altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made, and establishing others in their stead; and in numerous instances Congress in effect ratified such action.

Donnelly, 228 U.S. at 257. For example, the Tule River Reserve was created under the 1864 Act by Executive Order of President Grant. *See* Exec. Order Jan. 9, 1873. The Tule River Reserve's boundaries were changed by Executive Order, *see* Exec. Order Oct. 3, 1873, and, on August 3, 1878, by Executive Order of President Rutherford B. Hayes, the entire Tule River Reserve was restored to public domain. *See* Exec. Order Aug. 3, 1878. An act that confers such broad discretion – discretion to create and terminate reservations, or parts of reservations, by fiat – does not create compensable rights in such reservations.

Plaintiffs contend, however, that Congress' desire to establish "permanent peace" through the 1864 Act shows

that the 1864 Act conferred ownership rights upon the Indians. The plaintiffs are correct that the purpose of the 1864 Act was to stop the conflict in California between the white settlers and the Indians. However, an intent to create "permanent peace" does not mean that the 1864 Act created any permanent occupancy rights. The Act implemented its "peace" purpose, not by giving the Indians vested rights, but by giving the President broad discretion to create reservations under the 1864 Act. As noted in *Donnelly*, 228 U.S. at 256,

> Congress could not reasonably have supposed that the President would be able to accomplish the beneficent purposes of the enactment if he were obligated to act, once for all, with respect to the establishment of the several new reservations that were provided for, and were left powerless to alter and enlarge the reservations from time, in the light of experience,

and thus, "Congress and the Executive practically construed the act of 1864 as conferring a continuing authority upon the latter, and a large discretion about exercising it." In short, the 1864 Act sought to achieve "permanent peace" by giving the President broad discretion, rather than by conferring upon the California Indians vested property rights.

V.

Appellants argue that, even if the 1864 Act itself created no permanent property rights for Indians, later legislative and judicial actions have made and confirmed such rights. The 1864 Act and the executive orders that created the reservation gave the Indians a right to occupy the land. Rights of occupancy, however, do not constitute compensable property interests unless specifically recognized as ownership by an Act of Congress. *See Tee-Hit-Ton*, 348 U.S. at 289. Appellants have not shown this specific

recognition. Indeed, the "permanent" status of a reservation is not immutable, nor does it grant any permanent rights to the Indians thereon. Congress can terminate a reservation it had earlier established. *See Mattz*, 412 U.S. at 505. On a reservation created by executive order, such as the Square, Indians have only those rights of occupancy granted by the sovereign. *See Tee-Hit-Ton*, 348 U.S. at 279. Thus, the occupancy rights in this case "may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Id.*

Plaintiffs seize on the language in several cases to buttress their claims for vested rights, asserting that compensable property rights may be granted by relatively imprecise legislation or treaty language. The isolated quotes from those cases, however, do not lead to the conclusion that the Indians have compensable rights in the square. In *United States v. Klamath & Moadac Tribes*, 304 U.S. 119 (1938), for instance, the Supreme Court decided that the phrase "set apart as a residence" "did not detract from the tribes' right of *occupancy*." 304 U.S. at 123 (emphasis added). As already noted, however, a right of occupancy is not a compensable property interest. In *Klamath & Moadac Tribes* Indians sought compensation for land obtained from the United States by treaty, but which the Government "mistakenly" gave to private developers. The Indians considered the United States' offer of limited compensation inadequate. The Court declared that the United States had only a moral, not a legal, obligation to compensate the Indians. Reiterating the basic principle that compensable property interests must be expressly assigned, the Supreme Court noted that "[s]ave to the extent that Congress may authorize, the government's dealings with Indian tribes are not subject to judicial review." *Klamath & Moadac Tribes v. United States*, 296 U.S. 244, 255 (1935) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567, 568 (1903)). Similarly, in *Menominee Tribe of Indians v.*

United States, 391 U.S. 404, 406 (1968), the phrase "held as Indian lands are held" did not, by itself, suffice to give hunting and fishing rights to Indians. The Supreme Court narrowly defined the rights granted by that phrase only as authorization for the Indians "to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing." *Id.* These examples do not, therefore, establish that anything less than specific granting language recognizes compensable property rights.

The occasional appropriation of funds by Congress to the reservation for various purposes also does not represent, as plaintiffs assert, the clear-cut vesting of permanent rights required by *Tee-Hit-Ton* for compensation. These appropriations show no more than a "repeated recognition of the reservation status of the land." *Mattz*, 412 U.S. at 505. These Acts appropriated funds to pay evicted settlers for their improvements to the land that became the Hoopa Valley reservation, Act of March 3, 1865, 13 Stat. 538; to pay a physician, a blacksmith and assistant, a farmer, a teacher, and a carpenter for services on the reservation, Act of July 27, 1868, 15 Stat. 221, and to pay the traveling expenses of superintending agents, Act of April 10, 1869, 16 Stat. 36. These superintending Acts do not grant permanent rights. *Cf. Shoshone Tribe v. United States*, 299 U.S. 476, 495 (1937) (permanent occupancy rights on Shoshone land granted to Arapahoes based on a series of statutes "recognizing the Arapahoes equally with the Shoshones as occupants of the land"). Appropriations for maintenance expenses cannot be interpreted as recognition of a reservation as the permanent property of its Indian residents.

Plaintiffs also assert that the settlement of their claims under the California Indians' Jurisdictional Act of 1928, 25 U.S.C. § 651 *et. seq.*, recognizes their permanent and compensable rights. The 1928 Act gave the United States Court of Claims jurisdiction to hear claims of the Indians of California for "equitable relief" against the United States.

See 25 U.S.C. § 652 (1994).[5] In particular, the 1928 Act provided a route for the Indians to seek compensation for the United States' disregard of the eighteen unratified treaties of 1852. *See* 25 U.S.C. § 653 (1994). However, the Act specifically reduced the Indians' compensation by the amount the United States had paid for the "support, education, health, and civilization of Indians in California, including purchases of land." *Id.* This setoff did not indicate recognition of compensable rights in the land of the reservation. As the Court of Claims made clear in a case settling Indian claims under the 1928 Act,

> This case does not involve the payment for land of which the Indians had a cession, or use and occupancy. No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained. The decree can only be for a fixed amount of compensation. There has been no taking which under the Constitution would re-quire just compensation to be paid and therefore would involve interest. The amount awarded would only be in full settlement of a recognized equitable claim which the

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[5] "All claims of whatsoever nature the Indians of California . . . may have against the United States by reason of lands taken from them . . . by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands . . . which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the United States Court of Federal Claims by the attorney general of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is conferred upon the United States Court of Federal Claims to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon." 25 U.S.C. § 652 (1994).

> Congress has ordered the Court to ascertain, and, after ascertainment, to enter a decree.

Indians of California v. United States, 98 Ct. Cl. 583, 600 (1942). As required by the 1928 Act, the Court of Claims reduced the Indians' compensation by $1.25 per acre for lands that were "set aside by the United States for the plaintiff Indians as reservations and otherwise, by Executive Orders, acts of Congress or otherwise." *Indians of California v. United States*, 102 Ct. Cl. 837 (1944). Nothing in the 1928 Act or its judicial enforcement, however, makes this setoff a permanent grant of the reservation land, with associated vested rights. The setoff was actually just a reduction in an amount gratuitously offered by the United States, for reasons of conscience, to the Indians. The 1928 Act did not reach the standard of a "definite intention . . . to accord legal rights [beyond rights of] . . . permissive occupation." *Tee-Hit-Ton*, 348 U.S. at 279.

VI.

Plaintiff Yuroks also argue that their tribe's continuous occupancy and use of the joint reservation and its resources demonstrate their compensable interests. This argument would be difficult for either the Yuroks or the Karuks to sustain on historical grounds, and has been dismissed repeatedly on legal grounds. *Tee-Hit-Ton*, 348 U.S. at 289.

Yuroks can, at best, claim only "Indian title" to part of the lands of the formerly joint Hoopa Valley reservation. The traditional territory of the Yuroks, or lower-Klamath Indians, was along the coast of the Pacific Ocean near the mouth of the Klamath River, as well as along the river itself. A part of these traditional homelands became the addition to the Hoopa Valley Joint Reservation in 1891. The 1988 Settlement Act severed this addition and made it an exclusive Yurok reservation. Both as a matter of history and as a matter of law, the record does not support the Yuroks'

claim, by "immemorial occupancy," to Indian title to the Hoopa Valley itself, site of the square.

Karuks, the upper Klamath Indians, have even less claim to Indian title to the lands of the Hoopa Valley reservation. The Karuks admit they never relocated to the Hoopa Valley reservation after it was established, but retreated into high ground away from the Klamath river. After gold-seeking intruders had left, the Karuks returned to their habitat along the upper Klamath. The record before this court, moreover, contains no evidence that either Yuroks or Karuks have even a claim to Indian title to the Hoopa Valley itself.

VII.

Finally, plaintiffs assert that passage of the Indian Mineral Leasing Act of 1927, 25 U.S.C. §§ 398a-398e (1994), acknowledged their title to executive order reservation lands. Plaintiffs raise this issue for the first time in this appeal. Only rarely will an appellate court entertain issues not clearly raised in the proceedings below. *See Boggs v. West*, 188 F.3d 1335, 1337 (Fed. Cir. 1999). This rule ensures that "litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Heivering*, 312 U.S. 552, 556 (1941). In the absence of a general rule on considering issues raised for the first time on appeal, the Supreme Court has left the question to the discretion of this court. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). In some instances, courts of appeals have permitted consideration when such issues present only legal, not factual, questions. *See, e.g., Bellotti v. Baird*, 428 U.S. 132, 143-44 n. 10 (1976); *White v. Department of the Army*, 720 F.2d 209, 211 (D.C. Cir. 1983); *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). Because interpretation of the 1927 Act is a legal question, this court elects to consider plaintiffs' assertion.

The 1927 Act states:

> The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations . . . shall be deposited . . . to the credit of the tribe of Indians for whose benefit the reservation . . . was created or who are using and occupying the land.

25 U.S.C. § 398b (1994). Plaintiffs argue that the three-year legislative history of the 1927 Act evinces a change from a sharing of a part of the royalties with state governments to one of allocating all royalties to a trust for the Indians, and contend that this legislative history shows that Congress recognized equitable Indian title to the reservation lands. *See* Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627, 632-33 (1960). Even assuming that the legislative history does contain the alleged alterations in tentative bill language, these deliberations within the legislative branch do not affect anything beyond the subject of the 1927 Act – mineral royalties. Because it is empowered to dispose of public property, Congress can allocate the benefits of reservation lands without also recognizing title. *See United States v. Jim*, 409 U.S. 80 (1972) (1933 Congressional Act adding certain lands in Utah to the Navajo Reservation and setting aside mineral royalties for Indians did not create property rights). Indeed, fifteen years after passage of the 1927 Act, the Supreme Court discerned no title-granting power in the Act. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 330-331 (1942); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 687 (9th Cir. 1976). The 1927 Act merely confirms that Congress can, and will, grant any portions of any rights to reservation lands as it wishes, while still retaining title.

VIII.

The United States may extinguish Indian title by "purchase or conquest." *Johnson v. McIntosh*, 8 Wheat. at 585-588. Alternatively, Indian occupancy may be extinguished by the government without compensation, unless an Act of Congress has specifically recognized the Indians' ownership rights. *See Tee-Hit-Ton*, 348 U.S. at 289. Even if plaintiffs could establish Indian title to the lands in dispute, the 1864 Act and subsequent actions of the United States do not show that the plaintiffs possessed any compensable property interests in the Hoopa Valley reservation. *See id.* at 279; *United States v. Alcea Band of Tillamooks*, 329 U.S. at 46.

Because plaintiffs have not shown possession of compensable property rights, this court need not examine whether the 1988 Settlement Act took or extinguished any rights. For these reasons, this court affirms the trial court's summary judgment.

COSTS

Each party shall bear its own costs.

AFFIRMED

Appendix A

United States Court of Appeals for the Federal Circuit

99-5002, -5003, -5006

KARUK TRIBE OF CALIFORNIA,

Plaintiff-Appellant,

and

CAROL MCCONNEL AMMON, LESLIE AMMON, ELSIE McCOVEY BACON, JULIA LAURETTA BARTOW, OLLIE ROBERTS FOSEIDE, BONITA BACON GREEN, JANICE M. GREEN, DOROTHY WILLIAMS HABERMAN, RICHARD L. HABERMAN, EVELINA HOFFMAN, MARY GIST JACKSON, MARTIN KINDER, SR., RACHEL L. KNIGHT, ERNEST LEWIS, JR., ANNIE MITCHELL LOVE, ARDITH MCCONNELL, MICHAEL MCCONNELL, ROBERT B. MCCONNELL, WALTER C. MCKINNON, THELMA W. MCLAUGHLIN, STEVEN J. METCALFE, EDWARD E. MITCHELL, VETA GILLESPIE MITCHELL, GERTRUDE V. MOLLIER, EDWARD MOORE, DAVID E. O'NEILL, HERBERT L. O'NEILL, BARBARA E. ORCUTT, LAWRENCE E. ORCUTT, DAVID ERIC SEVERNS, MARIA E. TRIPP, and KATHRYN ICHELSON WILD,

Plaintiffs-Appellants,

and

YUROK INDIAN TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

and

HOOPA VALLEY TRIBE,

Defendant-Appellee.

NEWMAN, *Circuit Judge*, dissenting.

It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment. *See* Act of June 27, 1952, Pub. L. No. 82-414 as amended, 8 U.S.C. §1401:

> The following shall be nationals and citizens of the United States at birth: . . . (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.

The jurisprudence of conquest, set forth in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1830), has no applicability to this case. This case is not concerned with Indian title deriving from aboriginal occupancy as against title derived from James I, *see* 21 U.S. at 587; it is concerned solely with Reservation lands duly established by governmental action, and today's property interests, in constitutional terms, of the Indian occupants of Reservation lands. It is a case of first impression; and its holding is incorrect as well as unjust.

The Hoopa-Yurok Settlement Act of October 31, 1988 (the source of this litigation) recognized the Indians' property interests in the Joint Reservation. In providing that the Court of Federal Claims has jurisdiction of compensation claims arising from the 1988 Act, 25 U.S.C. § 1300i-11, Congress recognized that its restructuring of the Joint Reservation could give rise to claims under the Fifth

Amendment. The interests of the Yurok and Karuk tribes[1] in the Joint Reservation did not arise from any asserted tribal title of antiquity, the claim rejected in *Johnson v. McIntosh*, but from acts of the United States as sovereign, the authority endorsed in *Johnson v. McIntosh*.

The recognition of property interests is fundamental to the culture as well as the law of this nation. Recognition of these Indians' interests in the Joint Reservation property that they have occupied for over a century is not a mere "matter of conscience," as the panel majority holds, but a matter of law and right, cognizable in the courts. *See Romero v. Kitsap County*, 931 F.2d 624, 627 n.5 (9th Cir. 1991) ("[P]laintiffs claim that they were deprived of rights secured under both the Constitution and specified Indian treaties. Claims of deprivation of constitutional rights are, of course, cognizable under section 1983, as are, under specified circumstances, claims for deprivations of treaty-based rights.") (citations omitted). Monetary claims of just compensation based on deprivation of property by governmental action are similarly cognizable in the Court of Federal Claims.

The Court of Federal Claims incorrectly required "title" as a threshold requirement of Fifth Amendment applicability to a compensable interest in the Joint Reservation. The presence of a compensable interest of constitutional dimension does not depend on whether title to the Joint Reservation is held by its Indian occupants or by the United States as their trustee. The issue is whether the tribes that were consigned to this Joint Reservation, by the

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[1] I do not discuss separately the claims of the unaffiliated Native Americans who are also appellants, for the principles here stated do not depend on whether those affected tribe.

congressional Act of April 8, 1864 and the implementing executive orders of June 23, 1876 and October 16, 1891, have property interests that are subject to the Constitution. Congress correctly thought so, and designated the judicial path for review of just compensation claims arising from the 1988 Settlement Act. My colleagues on this panel, holding that these Indians have no compensable interest in the Joint Reservation and its resources, deny history, statute and precedent. Thus I must, respectfully, dissent.

The Joint Reservation

Since 1891 the Hoopa Valley, Yurok (Klamath), and Karuk tribes have been assigned to the Joint Reservation established pursuant to the 1864 Act of Congress and the implementing executive orders of 1876 and 1891. The historical record shows documents and promises, consideration and military pressure, whereby these California Indians agreed to cease warfare against the white settlers and inhabit reserved lands. As stated in *Jessie Short v. United States*, 486 F.2d 561 (Ct. Cl. 1973):

> It is perfectly plain that from the outset in 1864 all involved understood that the reservation was intended for an undetermined number of tribes including the Hoopas and Klamath, and that the authorities repeatedly acted on this assumption.

Id. at 565. These Indians are not interlopers into this land, but peoples designated to occupy the Joint Reservation. Their unchallenged possession thereof for over a century, by acts of the United States, created property interests within the cognizance of the Fifth Amendment.

The panel majority, ruling that no such interest exists, relies on the fact that the executive orders establishing and enlarging the Joint Reservation were not ratified as treaties. However, as discussed in *Tee-Hit-Ton v. United States*, 348

U.S. 272 (1955), the existence of a treaty is not necessary; what is necessary is congressional intent to establish a permanent reservation, and the actual establishment of such a reservation. Indeed, congressional intent as to permanence is not illuminated by whether there was a treaty, for in 1871 the government stopped negotiating treaties with the native tribes while continuing to instruct the President to establish reservations:

> Although the Executive Branch engaged in treaty-making with the Indian tribes before 1871, in that year Congress decided that it would no longer negotiate treaties with the tribes. Congress thus suspended the entire process of treaty negotiation with the Indian tribes and delegated power to the President to create specified numbers of Indian reservations. 25 U.S.C. § 71. "Reservations established after 1871 were accordingly created either by statute or, until Congress ended the practice in 1919, by executive order."

Parravano v. Babbitt, 70 F.3d 539, 545 (9th Cir. 1995) (quoting William C. Canby, *American Indian Law* 17-18 (2d ed. 1988)).

The Act of 1864 delegated to the President the authority to create four reservations for the California native tribes. The panel majority errs in relying on the absence of a treaty embodying the executive orders of 1876 and 1891 as negating any tribal property interest in the Joint Reservation. These orders, carrying out the 1864 Act and other instructions of Congress, were designed to effect a permanent peace between the native peoples of this region and the large influx of prospectors and settlers, with whom there were serious confrontations. The relocation and containment of warring Indians upon designation of the Joint Reservation was plainly intended as a permanent

home. There is no suggestion in the historical record that a temporary arrangement was contemplated by either the United States government who established it or the Native Americans who complied with it.

The Settlement Act of 1988, now partitioning the Joint Reservation, provided compensation to the displaced Indians. The issue raised in this lawsuit is the adequacy of the compensation. The Karuk tribe points out that its circumstances differ from those of the Yuroks, and the unaffiliated Indians point to their particular circumstances. The panel majority holds that none of these plaintiffs has a compensable interest, and thus can not challenge the justness of the compensation. I do not agree. Neither title in fee nor a ratified treaty is a requirement of Fifth Amendment applicability to Native American claims arising under the Constitution.

The Fifth Amendment Right Is Not Limited to Titular Ownership

The court also reasons that a constitutionally cognizable taking could not occur because these lands had not been permanently transferred to these Indians, the court referring to the absence of "title" to the Reservation lands. I need not belabor that title is not requisite to Fifth Amendment rights, and that property interests subject to just compensation are not limited to real property held in fee. Property interests of Fifth Amendment relevance have arisen in many forms other than title to real estate. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and cases cited therein (economic regulation may effect a taking); Andrus v. Allard, 444 U.S. 51, 65 (1979) (taking is evaluated by examining the action's "justice and fairness"); *Ruckelshouse v. Monsanto Co.*, 467 U.S. 986 (1984) (taking of trade secrets cognizable under the Fifth Amendment); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (taking of a leasehold was a taking for

Fifth Amendment purposes); *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (conversion of a railway easement into a recreational easement was a taking); *Avenal v. U.S.*, 100 F.3d 933 (Fed. Cir. 1996) (change in salinity of water in oyster beds due to government water diversion project was a taking); *Shelden v. United States*, 7 F.3d 1022 (Fed. Cir. 1993) (taking of a security interest when it was made unenforceable by government seizure of the property).

On any definition of the property rights and interests cognizable under the Fifth Amendment, those of the Indian plaintiffs constitute an interest subject to just compensation. Takings law does not exclude beneficial interests. The establishment of this Joint Reservation with the United States as trustee was for the benefit of these native peoples, *see United States v. Mitchell*, 463 U.S. 206, 225 (1983) (discussing the "general trust relationship between the United States and the Indian people"), whose right of permanent and peaceful occupancy has been confirmed by time as well as by governmental action. Beneficial interests in real property are not defeated simply because the fee is held by the trustee. A trust relationship does not authorize the trustee to evict the beneficiary.

The 1988 Settlement Act deprived the plaintiff tribes of occupancy rights in the major land area of the Joint Reservation, in favor of the Hoopa Valley tribe, as well as depriving the plaintiffs of the right established in the *Short v. United States* litigation to share in the timber income of that area, in favor of the Hoopa Valley tribe. *See generally Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B") (quoted in *Eastern Enterprises*, 524 U.S. at 523). These plaintiffs do not here challenge the government's authority to reallocate the Joint Reservation land and natural resources; they ask only that the compensation therefor be just. *See First English*

Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) ("[the Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

The Supreme Court has recognized that the fact of Indian occupancy, accompanied by the retention of title in the United States in trust "for the purpose of Indian reservations," the words of the 1864 Act, establishes a compensable interest. In *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 496 (1937) the Court explained:

> Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. What those incidents are, it is needless to consider now. The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land pro tanto, in substance, if not in form.

The Shoshone tribe had protested the government's forced division of their reservation and its resources with the Arapaho tribe. In holding that just compensation was required, the Court again stated that the Shoshone tribe had

> the right of occupancy with all its beneficial incidents; that, the right of occupancy being the primary one and *as sacred as the fee*, division by the United States of the Shoshone's right with the Arapahos was an appropriation of the land pro tanto;

United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115 (1938) (emphasis added). The Court stressed that "title in the strict sense" was not controlling, and that the retention of

legal title by the United States as trustee did not free it from the obligation to pay just compensation to the tribe:

> [A]lthough the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have the power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.

Id. at 115. *See also Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375 (1937) ("Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own").

In 1927 Congress acted to assure recognition of the permanence of Indian rights in reservations that were established by executive order. By 1927 Congress had already enacted laws to assure that the profits of logging and mineral extraction on reservation lands were used for the benefit of the Indian residents. *E.g.*, 41 Stat. 34 (1919) (mineral rights); 36 Stat. 857 (1910) (timber rights). The 1927 Act added oil and gas revenue rights, and also prohibited the President from altering the boundaries of executive order reservations without congressional approval. "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." Pub. L. No. 69-702, 44 Stat. 1347 (codified at 25 U.S.C. §§ 398a-398e). The government in its brief now challenges the

significance of the 1927 Act, a mysterious challenge, for since 1927 the record shows no reservation lands taken or realigned without just compensation in Fifth Amendment terms. *See, e.g.*, the Act of Sept. 30, 1968, 82 Stat. 885, 888 (lands of Salt River Pima-Maricopa Indian Community and Fort McDonald Apache Indian Community taken for Orme Dam); Act of June 24, 1974, 88 Stat. 266, 269 (transfer of lands to Cocopah Tribe in compensation for rights-of-way). *See* Felix S. Cohen, *Handbook of Federal Indian Law* (1982) at 496-497 n. 202 (collecting statutes). The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support.

A recent example of recognition of Fifth Amendment applicability to Indian property rights in reservation lands is seen in *Hodel v. Irving*, 481 U.S. 704 (1987), wherein the Court invalidated a provision of the Indian Lands Consolidation Act of 1983. The Court ruled that the Act's escheat of small estates to the tribe required compensation to the Indian heirs under the Takings Clause. Although the land was held "in trust" by the United States, the right of descent and devise by the Indian holders of the allotment was recognized. The recognition of reservation lands as property subject to the laws of inheritance, although nominally held by the United States in trust, contravenes my colleagues' theory that no compensable interest arises from beneficial occupancy.

The panel majority relies heavily on *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955), extending it to situations to which it did not and does not apply. At issue in that case were 350,000 acres of land and 150 square miles of water in Alaska, which the members of the Tee-Hit-Ton clan claimed to have occupied and used from time immemorial. The Court explained that these natives' use of this land and water was like "the use of the nomadic tribes of States Indians," and drew an explicit distinction from the rights

derived from occupancy of a "recognized" reservation. The Court explained that Indian rights in recognized reservations do not require any particular legal form, but that there must be governmental action and intention to form a reservation. *Id.* at 278-79. The Court found this action and intention absent for the areas claimed by the Tee-Hit-Ton clan.

In contrast, the Joint Reservation is a recognized reservation formed under congressional and executive authority. *See Mattz v. Arnett*, 412 U.S. 481 (1973) (affirming permanent status of the Joint Reservation). The claims herein do not remotely resemble those discussed in *Tee-Hit-Ton*. It does not defeat their claims that the Yurok or Karuk tribes occupied some of these areas in prehistory, as the panel majority observes. That does not convert their eviction from most of the Joint Reservation into a non-compensable act. While conquest may extinguish aboriginal claims, *see Johnson v. McIntosh*, the legislative adjustment of long-established rights in recognized reservations is today subject to the protection of the Constitution. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938). The panel majority misapplies the holding of *Tee-Hit-Ton* as negating any right to compensation deriving from the partition of the land and resources of the Joint Reservation.

The plaintiff Indians possessed not only the right to occupy the land of the Joint Reservation, but also the right to share in its timber income, litigated in the *Short v. United States* cases, *supra*. Compensable interests arise from natural resources as well as land, *see United States v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 123 (timber); *United States v. Shoshone Tribe*, 304 U.S. at 116 (minerals and timber). All parties agree that the 1988 Act was enacted to overrule *Short*. However, the 1988 Act was not based on a theory that these Indians do not have a compensable interest in this resource; the panel majority errs in so ruling.

Appendix A

Summary

The Act of 1864 and executive orders of 1876 and 1891 that created the Joint Reservation, and the plaintiff Indians' possession and occupancy thereof, created property interests of constitutional cognizance. The plaintiffs have a compensable interest in the land and resources of the Joint Reservation, and not the temporary and permissive status attributed by the panel majority. The 1988 Settlement Act itself recognizes the entitlement of the Indians of the Joint Reservation to just compensation. Thus the plaintiffs are entitled, by constitutional right and statutory direction, to judicial review of the issue of just compensation. I respectfully dissent from my colleagues' contrary ruling.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ERRATA

April 24, 2000

Appeal No. 99-5002,-5003,-5006

Karuk Tribe of California v. Carol McConnell Ammon, Leslie Ammon, Elsie McCovey Bacon, Julia Lauretta Bartow, Ollie Roberts Foseide, Bonita Bacon Green, Janice M. Green, Dorothy Williams Haberman, Richard L. Haberman, Evelina Hoffman, Mary Gist Jackson, Martin Kinder, Sr., Rachel L. Knight, Ernest Lewis, Jr., Annie Mitchell Love, Ardith McConnell, Michael McConnell, Robert B. McConnell, Walter C. McKinnon, Thelma W. McLaughlin, Steven J. Metcalfe, Edward E. Mitchell, Veta Gillespie Mitchell, Gertrude V. Mollier, Edward Moore David E. O'Neill, Herbert L. O'Neill, Barbara E. Orcutt, Lawrence E. Orcutt, David Eric Severns, Maria E. Tripp, and Kathryn Ichelson Wild, and Yurok Indian Tribe v. United States and Hoopa Valley Tribe

Precedential Opinion

Decided: April 18, 2000

Please note the following change to the Dissenting opinion of Judge Newman.

> On April 18, 2000, when the entire opinion in the above appeal was uploaded onto the Bulletin Board System (BBS) of the court and the Web, portions of the text of the dissenting opinion of Judge Newman were re-arranged. The text was all there, but portions of text were rearranged in the conversion. Footnote 1 was shifted to the end of the opinion. Spacing was changed throughout the opinion.

Appendix A

The text of the opinion has not been altered or changed in any way. The dissenting opinion has been corrected so the text is in the correct order. Footnote 1 is where it should be and spacing has been modified. The entire opinion is being uploaded onto the BBS and Web as of this date April 24, 2000, so that it reads correctly.

The opinion uploaded on April 18, 2000 has been deleted.

APPENDIX B

In the United States Court of Federal Claims

No. 90-3993L, 91-1432L, 92-173L
(Filed: August 6, 1998)

KARUK TRIBE OF CALIFORNIA,

Plaintiff

and

CAROL AMMON, et al.

Plaintiffs,

and

YUROK INDIAN TRIBE,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

HOOPA VALLEY TRIBE,

Defendant-Intervenor.

1988 Hoopa-Yurok Settlement Act; Fifth Amendment taking of property interests.

Dennis J. Whittlesey, Washington, D.C., for plaintiff Karuk.

George Forman, Berkeley, California, for plaintiff Yurok, with whom was John Shordike, of counsel.

William C. Wunsch, San Francisco, California, for plaintiffs Ammon *et al.*

Susan V. Cook, General Litigation Section, Environmental & Natural Resources Division, United States Department of Justice, Washington, D.C., for defendant, with whom were *Lois J. Schiffer*, Assistant Attorney General, *James E. Brookshire*, Deputy Chief, and *Thomas L. Halkowski*, Trial Attorney.

Thomas P. Schlosser, Seattle, Washington, for defendant-intervenor, with whom was *K. Allison McGaw*.

OPINION

MARGOLIS, *Judge*.

In this consolidated action, plaintiffs, the Karuk Tribe of California ("Karuk"), the Yurok Indian Tribe ("Yurok"), and individual Indians led by Carol McConnell Ammon ("Ammon Group"), move for summary judgment, claiming that the 1988 Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i *et seq.*, effected a Fifth Amendment taking of their property interests in the former Hoopa Valley Reservation ("Reservation"). All plaintiffs rely upon the Act of April 8, 1864, 13 Stat. 39, as the basis for their vested property claims. Plaintiffs further point to actions of defendant, the United States, such as allocation of funds for the tribes on the Reservation, allotment of land to individual Indians, and provision of education and other benefits to tribe members as support for their contention. Plaintiff Ammon Group also alleges that defendant is collaterally estopped by prior litigation from denying plaintiffs' vested interests in the Reservation. Defendant and defendant-intervenor, the Hoopa Valley Tribe, cross move for summary judgment, contending that neither the 1864 Act nor any subsequent benefits conferred thereunder vested any compensable property rights. As a result, defendant and defendant-intervenor argue, the 1988 Act does not implicate the

Takings Clause of the Fifth Amendment. Defendant and defendant-intervenor also move for summary judgment on the basis that plaintiffs are collaterally estopped from claiming a taking due to a prior case involving the Reservation. After a full briefing and oral argument on the issue, this court grants defendant and defendant-intervenor's motion for summary judgment, based solely on the takings grounds, and denies plaintiffs' summary judgment motions.

FACTS

The Hoopa Valley Reservation was created pursuant to the Act of April 8, 1864, 13 Stat. 39 ("1864 Act"). The pertinent part of the 1864 Act states that

> [t]here shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended.

13 Stat. at 40. In 1865, the Reservation's boundaries, encompassing a 12-mile square tract, were provisionally determined. President Ulysses S. Grant, in an 1876 executive order, formally defined the borders of the Reservation, which was also referred to as "the Square." *See Jessie Short v. United States*, 202 Ct. Cl. 870, 874 (1973). By executive order of President Benjamin Harrison, the Reservation was extended in 1891. The territory added to the Reservation has been referred to as "the Addition." *See id.* From the beginning of the Reservation until the present, the Square has been dominated by the Hoopa Valley Tribe ("Hoopa"),

and the Addition by the Yurok, with the Karuk dispersed in both areas.

A dispute over which Indians had rights to revenues generated from sales of timber on the Square was the basis of *Jessie Short v. United States*, 202 Ct. Cl. 870 (1973) ("*Short I*"), 228 Cl. Ct. 535 (1981) ("*Short II*"), 719 F.2d 1133 (Fed. Cir. 1983) ("*Short III*"), and 12 Ct. Cl. 36 (1987) ("*Short IV*"). In *Short I*, the Court of Claims held that none of the Indians on the Reservation had a superior right to the revenues generated by the sale of timber cut from the Square, regardless of whether the Indian lived on the Square or the Addition. *See Short I*, 202 Ct. Cl. at 884-85. Following that lengthy litigation, Congress in 1988 passed the Hoopa-Yurok Settlement Act of October 31, 1988 ("1988 Act"), 25 U.S.C. § 1300i *et seq.* The 1988 Act partitioned the Reservation, granting the use of the Square to the Hoopa as a reservation, and giving the use of the Addition to the Yurok for a reservation. The Karuk were not given any of the Reservation for use as their own.

The 1988 Act's partitioning of the Reservation instigated this litigation.

DISCUSSION

Plaintiffs contend that the 1864 Act vested their ancestors or tribes with compensable rights in the Reservation. As a result, plaintiffs claim they have been subject to a taking under the Fifth Amendment to the United States Constitution, which forbids the taking of property by the government without just compensation. The Yurok contend they had a compensable expectancy in the Square taken away by the 1988 Act. The Karuk claim their vested interest in the entire Reservation was deprived by the 1988 Act. Finally, the Ammon Group claim their vested rights in the Reservation were destroyed without compensation by the 1988 Act. The United States has filed a motion for summary judgment, alleging that plaintiffs do not possess a

compensable expectancy in the Reservation because the 1864 Act did not grant vested property rights to the Indians, and that plaintiffs are collaterally estopped from relitigating the issue of vested property rights, which, defendant contends, was resolved in *Short I*. Defendant-intervenor, the Hoopa, has joined in the United States's motion.

Plaintiffs oppose defendant's motion and have separately filed cross-motions for summary judgment,[1] arguing that as a matter of law they have compensable expectancies in the Reservation through the 1864 Act, or alternatively on grounds such as legislative intent, various Indian tribes' understanding of the situation, the fact that plaintiffs were aboriginal residents of the land, provision by the federal government of education, health care, and welfare, allotment of land to individual Indians, and general monitoring of social conditions on the Reservation. The Ammon Group also alleges that defendant and defendant-intervenor are collaterally estopped by *Short I* from denying plaintiffs' vested interests in the Reservation.

Though the court does not find any party's collateral estoppel argument to be persuasive, it chooses not to address that issue because the takings issue is dispositive.

I. Governing Principles

In order for a plaintiff to invoke the Fifth Amendment Takings Clause, it must establish a "historically rooted expectation" of compensability in the property alleged to have been taken. *See Lucas v. South Carolina Coastal*

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[1] Although the Yurok and the Ammon Group both filed cross-motions for summary judgment after the United States and the Hoopa filed their motion for summary judgment, the Karuk filed its own motion for summary judgment shortly after defendant and defendant-intervenor filed their motion.

Council, 505 U.S. 1003, 1027-28 (1992); *California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992). The range of interests qualified for protection under the Fifth Amendment is defined by the "existing rules or understandings that stem from an independent source such as state law," *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), and the "relevant background principles." *Lucas*, 505 U.S. at 1030; *see also Preseault v. United States*, 27 Fed. Cl. 69, 88, 89 (1992).

Congress holds exclusive power to dispose of public lands of the United States. *See* U.S. Const. art. IV, § 3 ("The Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States."). Any power of the executive to convey an interest in public lands must be traced to a clear delegation of Congress's Article IV power. *See Sioux Tribe v. United States*, 316 U.S. 317, 325-26 (1942). Thus, when "Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 104 (1949). Silence cannot be construed as congressional intent to convey such powers to the executive, nor can it be taken as acquiescence in an executive act that appears to convey a permanent interest. *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176, 177-78 (1947).

Unless recognized as vested by some act of Congress, tribal rights of occupancy and enjoyment, whether established by executive order or statute, may be extinguished, abridged, or curtailed by the United States at any time without payment of just compensation. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955); *Hynes*, 337 U.S. at 103-04; *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir. 1976). Until title is "recognized," it cannot be said that a plaintiff has the historically rooted expectation of compensability necessary to recover in an action for just compensation. *See id.*

Recognition of title may be established through various means:

> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

Tee-Hit-Ton Indians, 348 U.S. at 278-79 (citing *Hynes*, 337 U.S. at 101).

Lack of recognized title has often been found when the land involved, such as the Reservation, has been withdrawn from the public domain by executive order. Federal courts have long held that where a reservation is created by executive order, and without congressional recognition of vested tribal ownership rights, the United States is not liable for a taking if it later modifies the rights of those living on the land. *See Hynes*, 337 U.S. at 103-04; *Southern Pac. Transp. Co.*, 543 F.2d at 685-87. As the Supreme Court reasoned,

> [a]n Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form.

Hynes, 337 U.S. at 103.

Through a lengthy examination of the 1864 Act, its legislative history, as well as both prior and subsequent actions, this court finds that Congress did not bestow upon plaintiffs or their ancestors any permanently vested property rights to the Reservation, nor did it give the executive the

power to do so. Further, none of Congress's later actions or conferring of benefits created a vested interest. The court therefore holds that plaintiffs never had a compensable expectancy in the Reservation, and the 1988 Act accordingly did not violate the Takings Clause.

II. The 1864 Act

When a court is asked to decide the meaning of a statute, the first point of analysis is the language of the statute. As the Supreme Court has reasoned, "[o]ur task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors. Inc.*, 458 U.S. 564, 570 (1982) (citations omitted); *see also Negonsott v. Samuels*, 507 U.S. 99, 104 (1993).

When Congress intends to convey vested title in land, it uses express language of permanence, and clearly identifies the beneficiaries. As the Court said in *Hynes*,

> [w]hen a reservation is established by a . . . statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action.

Hynes, 337 U.S. at 103; *see also Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56 (1976).

The 1864 Act is devoid of express language vesting permanent ownership rights. The key statutory provision of the 1864 Act states that

> there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state.

13 Stat. at 40. This grant of authority to the President was closely examined by the Supreme Court in *Donnelly v. United States*, 228 U.S. 243 (1913). There, the Court concluded that the 1864 Act showed Congress's intent to confer merely a discretionary power upon the executive. *See id.* at 256. This decision was based on two factors. First, the Court noted that the state of Indian affairs within California in 1864 was such that

> Congress could not reasonably have supposed that the President would be able to accomplish the beneficent purposes of the enactment if he were obligated to act, once and for all, with respect to the establishment of the several new reservations that were provided for, and were left powerless to alter and enlarge the reservations from time to time, in the light of experience.

Id. at 256-57.

Second, the Court noted that beginning shortly after the passage of the 1864 Act, both Congress and the President construed the Act as conferring a continuing discretionary authority upon the executive branch. *See id.* at 257. To illustrate this point, the Court cited subsequent governmental actions which enlarged, reduced, or abolished reservations created pursuant to the 1864 Act. The Court also noted that when land from 1864 Act reservations had been restored to the public domain, it had not created any liability on the part of the government. *See id.* at 258.

The meaning of the 1864 Act was further examined by the Court of Claims in *Short I*, which held that

> [t]he powers conferred by this statute are to be construed in keeping with the broad connotations of the words employed: "at his discretion," "suitable extent,"

> "accommodations of the Indians," "practicable," and "due regard." . . . It is not disputed that the President had complete discretion as to which tribes were to be located on any of the reservations. The number of the tribes to occupy a reservation was also a matter for Presidential decision. . . . How many tribes was left to the President; the President would in his discretion adjust the size of a reservation to the number of tribes and Indians to be accommodated.
>
> Given such a statutory scheme, faithfully reflected by the omission of reference to any Indian tribe in the notices of 1864-65 and the executive order of 1876, the Hoopa Indians could get no vested or preferential rights to the Square from the fact alone of being the first or among the first to occupy the Square with Presidential authority. . . . Any exercise of the President's discretion in favor of the Hoopas, in approving their residence on the reservation, gave the Hoopas no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion.

Short I, 202 Ct. Cl. at 877-78 (citations omitted). As a result, the *Short I* court determined that "[n]o vested Indian rights in the Square existed." *Id.* at 884.

Additionally, the 1864 Act states unequivocally that the Reservation land is "to be retained by the United States." 13 Stat. at 40. If Congress had intended to vest plaintiffs or their ancestors with compensable expectancies in the Reservation, it would not have included such a clear provision preserving the property for the United States.

Consequently, as both the Supreme Court and the Court of Claims have stated, the plain meaning of the 1864 Act afforded no tribe a compensable expectancy in the Reservation, but instead subjected its inhabitants to the exercise of both the Congress and the President's discretionary power. *See id.; see also Hynes*, 337 U.S. at 103-04; *Healing v. Jones*, 174 F. Supp. 211, 216 (D. Ariz. 1959); 210 F. Supp. 125 (D. Ariz. 1962) (three judge panel), *aff'd*, 373 U.S. 758 (1963).

III. Legislative History

The legislative history of the 1864 Act shows even more clearly that Congress lacked the intent to vest a permanent expectancy for the plaintiffs' in the Reservation. The Act, introduced into Congress as Senate Bill 80 ("S.80"), was not the first attempt to bring order and efficiency to the handling of California Indians. Instead, it was the reformulation of a bill that had failed to gain legislative approval in the prior year. Thus, insight into the intent of Congress can be gained through comparing the two bills and the debate surrounding each of them.

In 1863, Senate Bill 501 ("S.501") was introduced by California Senator James A. McDougall. The bill provided, among other things, for abandonment and public sale of two reservations in California, and the establishment of a single reservation in California's Round Valley. Under S.501, the new reservation was to be for the "perpetual use and occupation" of all the Indians from the interior of the northern half of California. *See* Cong. Globe, 37th Cong., 3d Sess. 1302 (1863). Ultimately the bill was amended to have a reservation created at Round Valley to hold all the Indians of the northern portion of California. *See id.* The bill passed the Senate, and then was debated in the House. *See id.*; Cong. Globe, 37th Cong., 3d Sess. 1486-87 (1863). There, some representatives questioned the authority of the government to unilaterally take Indian reservation land and sell it to the

public. Representative Phelps of California answered these questions, stating that "[t]hese districts of country of which we speak as Indian reservations, are not Indian reservations such as we speak of on this side of the Rocky mountains. The title to the lands is in the General Government, and not in the Indians." *Id.* at 1487. Further, Representative Aaron Sargent of California said, "[t]here have been no treaties with the Indians of California," but the government "has proceeded upon an entirely different theory, recognizing the Indians are entitled to protection and reasonable support, but not as owners of the soil." *Id.* Despite these statements, the bill was never passed by the House. *See id.*

In 1864, S.80 was introduced by Senator John Conness. This bill, which became the 1864 Act, omitted several key components of the earlier, failed S.501. Most importantly, S.80 did not include S.501's provision that the reservation land be set aside for the perpetual use and occupation of the Indians. Instead, S.80 included language which gave the President discretion and flexibility in handling the California Indian situation.[2] In advocating passage of S.501, Senator Doolittle reminded the Senate that up until then the system had been "too indefinite, too expensive, too loose in its administration," Cong. Globe, 38th Cong., 1st Sess. 1209 (1864), and that, as Senator Conness stated, "this bill proposes economy in the Indian affairs of California." Cong. Globe, 38th Cong., 1st Sess. 1184 (1864). The same economic based reasoning was used in the House, and S.80 ultimately passed and became the 1864 Act. *See id.*

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[2] Examples of this flexibility included authorizing the President to create up to four reservations of "suitable extent for the accommodation of the Indians" and located as "remote from the white settlements as may be found practicable." Act of April 8, 1864, 13 Stat. 39, 40.

Thus, the legislative history is devoid of evidence that supports plaintiffs' contention that the 1864 Act vested them with compensable expectancies in the Reservation. Instead, language which would have given the Indians a reservation for "perpetual use and occupation," included in the failed S.501, was omitted from the 1864 Act.

IV. Congressional Actions Subsequent to the 1864 Act

The inquiry concerning any post-authorization congressional recognition or vesting of Indian title to the Reservation focuses upon the clear intent of Congress in its actions relating to the Reservation after 1864. Although there is no general test, in order for such a vesting to occur, "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians*, 348 U.S. at 278-79. Here too plaintiffs have failed to show that congressional actions had the required definite intention to create a compensable expectancy in the Reservation for any tribe.

Plaintiffs cite the acts of March 3, 1865, July 27, 1868, and April 10, 1869, which appropriated funds to the Reservation, as evidence of Congress's intent to grant a permanent, compensable expectancy. These acts, however, do not offer any proof of such a definite intention by Congress, but instead merely appropriated funds to purchase improvements and personal property of settlers in the Hoopa Valley, as well as for food, clothing, and various other needs of the Indians on the Reservation. *See* Act of March 3, 1865, 13 Stat. 538; Act of July 27, 1868, 15 Stat. 198, 221; Act of April 10, 1869, 16 Stat. 36, 37. None of these acts discusses tribal title or occupancy of the Reservation, names beneficiaries, or otherwise demonstrates any definitive intent by Congress to confer permanent rights on the Indians occupying the Reservation. *See Tee-Hit-Ton Indians*, 348 U.S. at 278-79.

Contrary to plaintiffs' contentions, the 1887 General Allotment Act ("1887 Act"), codified at 25 U.S.C. §§ 331-354, also fails to provide recognition of compensable rights in executive order reservations. As the Supreme Court reasoned when it rejected a similar argument made by the Sioux Tribe regarding the 1887 Act, it

> meant no more than that Congress was willing that the lands within [the executive order reservations] should be allotted to individual Indians according to the procedure outlined. It did not amount to a recognition of tribal ownership of the lands prior to allotment.

Sioux Tribe of Indians, 316 U.S. at 330.

Further, plaintiffs' reliance on the Act of June 17, 1892, 27 Stat. 52 ("1892 Act"), which opened the former Klamath River Reservation to settlement by non-Indians, is also inappropriate. As has already been adjudicated in *Short I*, that act was "not intended or understood . . . to have any bearing on the rights of the residents of the Hoopa Valley Reservation." *Short I*, 202 Ct. Cl. at 979 (finding 185).

Plaintiffs also fail to establish any definite congressional intent to confer permanent rights through the Indians of California legislation, Act of May 18, 1928, 45 Stat. 602, 25 U.S.C. § 651 *et seq.* ("1928 Act"). Contrary to plaintiffs' claims, this act was merely jurisdictional in nature, authorizing initiation of a suit to determine an "equitable amount due [all the Indians of California] from the United States." 25 U.S.C. § 652. The 1928 Act did not, however, express any view on the nature of the rights Indians had in existing reservations. Instead, it merely recognized "an equitable claim" by the Indians for lands previously taken from them. *See Indians of Cal. v. United States*, 98 Ct. Cl. 583, 599-600 (1942). Nowhere in the 1928 Act did Congress discuss any intent of earlier congressional acts to

permanently turn over lands to the Indians. *See Donahue v. Butz*, 363 F. Supp. 1316, 1323 (N.D. Cal. 1973).

Plaintiffs' reliance on *Mattz v. Arnett*, 412 U.S. 481 (1973), is also misplaced. Plaintiffs have cited *Mattz* for a looser definition of "recognition" than the *Tee-Hit-Ton* requirements of definitive intent by Congress. *See id.* at 505. In *Mattz*, however, the Court was confronted with the question of jurisdictional status of the old Klamath Indian Reservation, an issue very different from ownership rights. The Court's inquiry focused on determining the boundaries of the reservation, and thus the Court recognized the limits of state jurisdiction over Indians. *See Mattz* 412 U.S. at 504-06; *see also* 18 U.S.C. § 1151 (stating that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent"). The Court did not address the issue of vested property rights. *See Mattz* 412 U.S. at 504-06. Indeed, the Court in *Mattz* did not cite *Tee-Hit-Ton* and its standard for recognition anywhere in its opinion, and instead used the word "recognized" to mean awareness or cognition that a reservation of some kind existed. *See Mattz* 412 US. at 505. Thus, as the Court of Claims said in *Short I*, *Mattz* decided different issues than those now before the court. *See Short I*, 202 Ct. Cl. at 873.

Plaintiff Yurok also argues that the continuous occupancy, reliance, and use of the Reservation established a compensable expectancy. Citing *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115-16 (1938), the Yurok argue that long standing occupation of the Reservation created a compensable interest. Plaintiff Yurok, however, has inappropriately relied upon *Shoshone* for this proposition. In *Shoshone*, the tribe's right of occupancy stemmed from a ratified treaty that stated that the land would be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians," and that no other person would be permitted to occupy the territory. *Shoshone*, 304 U.S. at 113.

That treaty, and the language it contains, are distinct from the language used in the executive order that created the Reservation in this matter. Thus, any right plaintiffs may have to stay on the Reservation pursuant to the 1864 Act is a statutory authorization subject to new congressional legislation altering or eliminating that privilege. See *Allred v. United States*, 33 Fed. Cl. 349, 356 (1995). Further, as the Supreme Court has stated, unilateral reliance upon the use of federal lands, such as is the case here, cannot form the basis for a compensable property interest. *See Tee-Hit-Ton*, 348 U.S. at 284-85.

The fact defendant provided federal benefits and services to the Indians on the Reservation also did not create a vested expectancy. Plaintiff Karuk argues that provision of federally sponsored benefits, such as schools to educate Indian children, field matrons, health and welfare services, administering of allotment programs for individual Indians, as well as monitoring social conditions on the Reservation, created a compensable interest. Such services, however, did not vest such an expectancy. Instead, these benefits, which were offered to other reservations as well, were merely gratuitous, did not bind defendant in any way, and could be altered or eliminated at any time. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987); *Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971).

The lack of a compensable expectancy in the Reservation is further supported by the way Congress handled other 1864 Act reservations. In 1873, Congress restored to the public domain part of the Round Valley Reservation, which had been created under the 1864 Act. *See* Act of March 3, 1873, 17 Stat. 633 ("1873 Act"); *Russ v. Wilkins*, 410 F. Supp. 579, 580 (N.D. Cal. 1976), *rev'd in part*, 624 F.2d 914 (9th Cir. 1980). Instead of acknowledging or paying off any vested interest of the Indians, Congress provided in the 1873 Act that the proceeds of the sales from the reservation lands be

> used to pay for the improvements and claims of settlers now residing within the limits of the new reservation created under this act, and for improvements of Indians on lands hereby restored to the public lands, after such improvements shall have been appraised and the appraisement approved, as hereinafter provided.

Act of March 3, 1873, 17 Stat. at 634.

Congress's handling of another 1864 Act reservation, the former Klamath River Reservation, similarly shows that the 1864 Act did not create any compensable expectancy for the plaintiffs in the Reservation. In 1892, Congress passed an act which opened the Klamath River Reservation for sale to settlers. *See* Act of June 17, 1892, 27 Stat. 52, 52. There, unlike the 1873 Act, Congress provided express language that stated that the proceeds of the sale were to be used for the benefit of the resident Indians. *See* Act of June 17, 1892, 27 Stat. at 53. The fact Congress decided to specifically include a proviso allocating proceeds to the Indians is additional evidence that Congress did not believe it had created a compensable expectancy through the 1864 Act.

This lack of a compensable interest in the Reservation is even more clear when compared with another Indian related act of 1864. Less than one month after the 1864 Act was approved, Congress passed the Act of May 5, 1864, 13 Stat. 63, which created a reservation for Indians in Utah. Using language very different from that used in the 1864 Act, this act provided that the

> superintendent of Indian affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set

> apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same.

Act of May 5, 1864, 13 Stat. 63, § 2. Unlike the non-vesting language used in the 1864 Act, the clear, definitive statutory language of the May 5, 1864 Act established a permanent home for the Ute Indian Tribe. *See Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1088 (10th Cir. 1985). Thus, if Congress had wanted to vest the plaintiffs or their ancestors with compensable expectancies in the Reservation, it clearly knew what language to use.

V. Actions Prior to the 1864 Act

Plaintiffs also attempt to show a vested interest in the Reservation through various Indians' understanding of the treaties signed between the United States and several California tribes in 1851 and 1852. Although the United States did negotiate numerous treaties with California tribes during those two years, none of the treaties was ever ratified by the Senate. *See Indians of Cal.*, 98 Ct. Cl. at 588-89; *Short I*, 202 Ct. Cl. at 895-96. As a result, these treaties cannot have binding effect upon defendant. *See* U.S. Const. art. II, § 2 (stating that the President shall "have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

In another attempt to assert a compensable expectancy, plaintiff Yurok claims that it has aboriginal title to the territory which became the Reservation, and thus is entitled to compensation for the 1988 Act. This argument fails as well, however, for it has long been acknowledged by the courts that aboriginal title may be "terminated" by the sovereign "without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton*, 348 U.S. at 279. Indeed, as the Supreme Court has held, aboriginal title constitutes no more than permissive title, which is

"vulnerable to affirmative action by the sovereign, which possesse[s] exclusive power to extinguish the right of occupancy at will." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *see also United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345, 347 (1941).

CONCLUSION

For the foregoing reasons, plaintiffs have failed to establish that they had a vested, compensable expectancy in the Reservation. Therefore, the Fifth Amendment protection against unlawful takings of property was not invoked by the 1988 Hoopa-Yurok Settlement Act. Plaintiff Karuk's motion for summary judgment, as well as the cross-motions for summary judgment by plaintiffs' Yurok and the Ammon Group, are denied. The motion and cross-motions for summary judgment of defendant and defendant-intervenor, the United States and the Hoopa Valley Tribe, are granted. The Clerk will dismiss the complaints. Costs for defendant.

s/Lawrence S. Margolis

LAWRENCE S. MARGOLIS

Judge, U.S. Court of Federal Claims

August 6, 1998

APPENDIX C

NOTE: Pursuant to Fed. Cit. R. 47.6 this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

99-5002,-5003,-5006

KARUK TRIBE OF CALIFORNIA,

Plaintiff-Appellant,

v.

CAROL MCCONNELL AMMON, LESLIE AMMON, ELSIE McCOVEY BACON, JULIA LAURETTA BARTOW, OLLIE ROBERTS FOSEIDE, BONITA BACON GREEN, JANICE M. GREEN, DOROTHY WILLIAMS HABERMAN, RICHARD L. HABERMAN, EVELINA HOFFMAN, MARY GIST JACKSON, MARTIN KINDER, SR., RACHEL L. KNIGHT, ERNEST LEWIS, JR., ANNIE MITCHELL LOVE, ARDITH MCCONNELL, MICHAEL MCCONNELL, ROBERT B MCCONNELL, WALTER C. MCKINNON, THELMA W. MCLAUGHLIN, STEVEN J. METCALFE, EDWARD E. MITCHELL, VETA GILLESPIE MITCHELL, GERTRUDE V. MOLLIER, EDWARD MOORE DAVID E. O'NEILL, HERBERT L. O'NEILL, BARBARA E. ORCUTT, LAWRENCE E. ORCUTT, DAVID ERIC SEVERNS, MARIA E. TRIPP, and KATHRYN ICHELSON WILD,

Plaintiffs-Appllants,

and

YUROK INDIAN TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

Appendix C

and

HOOPA VALLEY TRIBE,

Defendant-Appellee.

ORDER

The Yurok indian Tribe filed a petition for panel rehearing and rehearing en banc. The Karuk Tribe of California filed a petition for rehearing with suggestion for rehearing in banc. Carol McConnell Ammon, et al. (Ammon Group) filed a petition for rehearing en banc. The court invited the appellees to file responses to the rehearing briefs.

The Hoopa Valley Tribe of Indians filed a response the rehearings. The United States filed a response to the rehearings. An amicus brief was filed by the Tule River Tribe.

All briefs were referred initially to the panel that heard the appeal, and thereafter referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petitions for rehearing are denied.

(2) The petitions for rehearing en banc are denied.

The mandate of the court will issue on July 31, 2000.

FOR THE COURT,

July 24, 2000
Date

s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

cc: John R. Shoredike, Esq.
William C. Wunsch, Esq.

Appendix C

Dennis J. Whittlesey, Esq.
John A. Bryson, Esq.
Thomas P. Schlosser, Esq.
Tracy A. Labin, Esq.

99-5002, -5003, -5006

APPENDIX D

The text of the relevant portion of the Act of April 8, 1864, (13 Stat. 39) is as follows:

> Sec. 2. *And be it further enacted,* That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided,* That at least one of said tracts shall be located in what has heretofore been known as the northern district: *And provided, further,* That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid theron, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose: *And provided, further,* That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent, as in the opinion of the President

may be necessary, in order to its complete adaptation to the purposes for which it is intended.

Sec. 3. *And be it further enacted,* That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the commissioner of the general land-office, under direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe:

* * * *

Sec. 4. *And be it further enacted,* That the President of the United States be, and he is hereby, authorized, by and with the advice and consent of the Senate, to appoint an Indian agent for each of the reservations which shall be established under the provisions of this act, which said agent shall reside upon the reservation for which he shall be appointed, and shall discharge all the duties now or hereafter to be required of Indian agents by law, or by rules and regulations adopted, or to be adopted, for the regulation of the Indian service, so far as the same may be applicable. Each of the agents appointed as aforesaid shall, before entering upon the duties of his office, give bond in such penalties and with such conditions and such security as the President or Secretary of the Interior may require, and shall hold

his office for the term of four years, unless sooner removed by the President, and shall receive an annual salary at the rate of eighteen hundred dollars.

Sec. 5. *And be it further enacted,* That there may be appointed, in the manner prescribed by law, for each of said reservations, if in the opinion of the Secretary of the Interior the welfare of said Indians shall require it, one physician, one blacksmith, one assistant blacksmith, one farmer, and one carpenter, who shall each receive compensation at rates to be determined by the Secretary of the Interior, not exceeding fifty dollars per month.

APPENDIX E

CALIFORNIA – HOOPA VALLEY RESERVE.

Yuma Reserve.

(For order relating to Yuma Reserve in Arizona, see California, post page 831.)

– – –

CALIFORNIA.

Hoopa Valley Reserve.

[Occupied by Hunsatung, Hupa, Klamath River, Miskeet, Redwood, Saiaz, Sermolton, and Tishlanaton tribes; area, 155 square miles; established by act of April 8, 1864 (13 Stat., 39), and Executive orders.]

By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington City, D.C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian-reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity River, in Klamath County, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.

AUSTIN WILEY,

Superintendent Indian Affairs for the State of California.

Appendix E

FORT GASTON, CAL., *August 21, 1864.*

EXECUTIVE MANSION, *June 23, 1876.*

It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H. V. R., No. 3'; thence south 17½ degrees west, 905.15 chains, to southeast Corner on reservation; thence south 72½ degrees west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)

U. S. GRANT.

EXECUTIVE MANSION, *October 16, 1891.*

It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klainiath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached

under the laws of the United States are hereby excluded from the reservation as hereby extended.

BENJ. HARRISON.

APPENDIX F

UNITED STATES PUBLIC LAWS
100TH CONGRESS-SECOND SESSION
(c) 1988, REED ELSEVIER INC. AND REED ELSEVIER PROPERTIES INC.

PUBLIC LAW 100-580 [S. 2723]

OCTOBER 31, 1988

HOOPA-YUROK SETTLEMENT ACT

100 P.L. 580; 102 Stat. 2924; 1988 Enacted S. 2723; 100 Enacted S. 2723 CIS LEGIS. HISTORY DOCUMENT: 100 CIS Legis. Hist. P.L. 580 An Act

To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. <*25 USC 1300i*> SHORT TITLE AND DEFINITIONS.

(a) SHORT TITLE. -- This Act may be cited as the "Hoopa-Yurok Settlement Act".

(b) DEFINITIONS. -- For the purposes of this Act, the term --

(1) "Escrow funds" means the moneys derived from the joint reservation which are held in trust by the Secretary in the accounts entitled --

(A) "Proceeds of Labor-Hoopa Valley Indians-California 70 percent Fund, account number J52-561-7197";

(B) "Proceeds of Labor-Hoopa Valley Indians-California 30 percent Fund, account number J52-561-7236";

(C) "Proceeds of Klamath River Reservation, California, account number J52-562-7056";

(D) "Proceeds of Labor-Yurok Indians of Lower Klamath River, California, account number J52-562-7153";

(E) "Proceeds of Labor-Yurok Indians of Upper Klamath River, California, account number J52-562-7154";

(F) "Proceeds of Labor-Hoopa Reservation for Hoopa Valley and Yurok Tribes, account number J52-575-7256"; and

(G) "Klamath River Fisheries, account number 5628000001";

(2) "Hoopa Indian blood" means that degree of ancestry derived from an Indian of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, Tish-Tang-Atan, South Fork, or Grouse Creek Bands of Indians;

(3) "Hoopa Valley Reservation" means the reservation described in section 2(b) of this Act;

(4) "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitution and amendments approved by the Secretary on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972;

(5) "Indian of the Reservation" shall mean any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in its March 31, 1982, May 17, 1987, and March 1, 1988, decisions in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63);

(6) "Joint reservation" means the area of land defined as the Hoopa Valley Reservation in section 2(b) and the Yurok Reservation in section 2(c) of this Act.

(7) "Karuk Tribe" means the Karuk Tribe of California, organized under its constitution on April 6, 1985;

(8) "Secretary" means the Secretary of the Interior;

(9) "Settlement Fund" means the Hoopa-Yurok Settlement Fund established pursuant to section 4;

(10) "Settlement Roll" means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 5;

(11) "Short cases" means the cases entitled Jesse Short et al. v. United States, (Cl. Ct. No. 102-63); Charlene Ackley v. United States, (Cl. Ct. No. 460-78); Bret Aanstadt v. United States, (Cl. Ct. No. 146-85L); and Norman Giffen v. United States, (Cl. Ct. No. 746-85L);

(12) "Short plaintiffs" means named plaintiffs in the Short cases;

(13) "trust land" means an interest in land the title to which is held in trust by the United States for an Indian or Indian tribe, or by an Indian or Indian tribe subject to a restriction by the United States against alienation;

(14) "unallotted trust land, property, resources or rights" means those lands, property, resources, or rights reserved for Indian purposes which have not been allotted to individuals under an allotment Act;

(15) "Yurok Reservation" means the reservation described in section 2(c) of this Act; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 9 of this Act.

SEC. 2. RESERVATIONS; PARTITION AND ADDITIONS.

(a) PARTITION OF THE JOINT RESERVATION. – (1) Effective with the publication in the Federal Register of the Hoopa tribal resolution as provided in paragraph (2), the joint reservation shall be partitioned as provided in subsections (b) and (c).

(2)(A) The partition of the joint reservation as provided in this subsection, and the ratification and confirmation as provided by section 8, shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:

(i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and

(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.

(B) The Secretary, after determining the validity of the resolution transmitted pursuant to subparagraph (A), shall cause such resolution to be printed in the Federal Register.

(b) HOOPA VALLEY RESERVATION. -- Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

(c) YUROK RESERVATION. -- (1) Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "extension" (defined as the reservation extension under the Executive Order of October 16, 1891, but excluding the Resighini Rancheria) shall thereafter be recognized and established as the Yurok Reservation. The unallotted trust land and assets of the

Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.

(2) Subject to all valid existing rights and subject to the adoption of a resolution of the Interim Council of the Yurok Tribe as provided in section 9(d)(2), all right, title, and interest of the United States –

(A) to all national forest system lands within the Yurok Reservation, and

(B) to that portion of the Yurok Experimental Forest described as Township 14 N., Range 1 E., Section 28, Lot 6: that portion of Lot 6 east of U.S. Highway 101 and west of the Yurok Experimental Forest, comprising 14 acres more or less and including all permanent structures thereon, shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe and shall be part of the Yurok Reservation.

(3)(A) Pursuant to the authority of sections 5 and 7 of the Indian Reorganization Act of June 18, 1934 (25 *U.S.C.* 465, 467), the Secretary may acquire from willing sellers lands or interests in land, including rights-of-way for access to trust lands, for the Yurok Tribe or its members, and such lands may be declared to be part of the Yurok Reservation.

(B) From amounts authorized to be appropriated by the Act of November 2, 1921 (42 Stat. 208; 25 *U.S.C.* 13), the Secretary shall use not less than $ 5,000,000 for the purpose of acquiring lands or interests in lands pursuant to subparagraph (A). No lands or interests in lands may be acquired outside the Yurok Reservation with such funds except lands adjacent to and contiguous with the Yurok Reservation or for purposes of exchange for lands within the reservation.

(4) The –

(A) apportionment of funds to the Yurok Tribe as provided in sections 4 and 7;

(B) the land transfers pursuant to paragraph (2);

(C) the land acquisition authorities in paragraph (3); and

(D) the organizational authorities of section 9 shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this Act.

(d) BOUNDARY CLARIFICATIONS OR CORRECTIONS. – (1) The boundary between the Hoopa Valley Reservation and the Yurok Reservation, after the partition of the joint reservation as provided in this section, shall be the line established by the Bissel-Smith survey.

(2) Upon the partition of the joint reservation as provided in this section, the Secretary shall publish a description of the boundaries of the Hoopa Valley Reservation and Yurok Reservation in the Federal Register.

(e) MANAGEMENT OF THE YUROK RESERVATION. – The Secretary shall be responsible for the management of the unallotted trust land and assets of the Yurok Reservation until such time as the Yurok Tribe has been organized pursuant to section 9. Thereafter, those lands and assets shall be administered as tribal trust land and the Yurok reservation governed by the Yurok Tribe as other reservations are governed by the tribes of those reservations.

(f) CRIMINAL AND CIVIL JURISDICTION. – The Hoopa Valley Reservation and Yurok Reservation shall be subject to section 1360 of title 28, United States Code; section 1162 of title *18, United States Code, and section 403(a)* of the Act of April 11, 1968 (82 Stat. 79; *25 U.S.C. 1323(a)*).

SEC. 3. PRESERVATION OF SHORT CASES.

Nothing in this Act shall affect, in any manner, the entitlement established under decisions of the United States

Claims Court in the Short cases or any final judgment which may be rendered in those cases.

SEC. 4. HOOPA-YUROK SETTLEMENT FUND.

(a) ESTABLISHMENT. -- (1) There is hereby established the Hoopa-Yurok Settlement Fund. Upon enactment of this Act, the Secretary shall cause all the funds in the escrow funds, together with all accrued income thereon, to be deposited into the Settlement Fund.

(2) Until the distribution is made to the Hoopa Valley Tribe pursuant to section (c), the Secretary may distribute to the Hoopa Valley Tribe, pursuant to the provision of title I of the Department of the Interior and related Agencies Appropriations Act, 1985, under the heading "Bureau of Indian Affairs" and subheading "Tribal Trust Funds" at 98 Stat. 1849 *(25 U.S.C. 123c)*, not to exceed $ 3,500,000 each fiscal year out of the income or principal of the Settlement Fund for tribal, non per capita purposes: Provided, however, That the Settlement Fund apportioned under subsections (c) and (d) shall be calculated without regard to this subparagraph, but any amounts distributed under this subparagraph shall be deducted from the payment to the Hoopa Valley Tribe pursuant to subsection (c).

(3) Until the distribution is made to the Yurok Tribe pursuant to section (d), the Secretary may, in addition to providing Federal funding, distribute to the Yurok Transition Team, pursuant to provision of title I of the Department of the Interior and Related Agencies Appropriations Act, 1985, under the heading "Bureau of Indian Affairs" and subheading "Tribal Trust Funds" at 98 Stat. 1849 *(25 U.S.C. 123c)*, not to exceed $ 500,000 each fiscal year out of the income and principal of the Settlement Fund for tribal, non per capita purposes: Provided, however, That the Settlement Fund apportioned under subsections (c) and (d) shall be calculated without regard to this subparagraph, but any amounts distributed under this subparagraph shall

be deducted from the payment to the Yurok Tribe pursuant to subsection (d).

(b) DISTRIBUTION; INVESTMENT. – The Secretary shall make distribution from the Settlement Fund as provided in this Act and, pending payments under section 6 and dissolution of the fund as provided in section 7, shall invest and administer such fund as Indian trust funds pursuant to the first section of the Act of June 24, 1938 (52 Stat. 1037; 25 *U.S.C. 162a).*

(c) HOOPA VALLEY TRIBE PORTION. – Effective with the publication of the option election date pursuant to section 6(a)(4), the Secretary shall immediately pay out of the Settlement Fund into a trust account for the benefit of the Hoopa Valley Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of enrolled members of the Hoopa Valley Tribe as of the date of the promulgation of the Settlement Roll, including any persons enrolled pursuant to section 6, by the sum of the number of such enrolled Hoopa Valley tribal members and the number of persons on the Settlement Roll.

(d) YUROK TRIBE PORTION. – Effective with the publication of the option election date pursuant to section 6(a)(4), the Secretary shall pay out of the Settlement Fund into a trust account for the benefit of the Yurok Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of persons on the Settlement Roll electing the Yurok Tribal Membership Option pursuant to section 6(c) by the sum of the number of the enrolled Hoopa Valley tribal members established pursuant to subsection (c) and the number of persons on the Settlement Roll, less any amount paid out of the Settlement Fund pursuant to section 6(c)(3).

(e) FEDERAL SHARE. – There is hereby authorized to be appropriated the sum of $ 10,000,000 which shall be deposited into the Settlement Fund after the payments are

made pursuant to subsections (c) and (d) and section 6(c). The Settlement Fund, including the amount deposited pursuant to this subsection and all income earned subsequent to the payments made pursuant to subsections (c) and (d) and section 6(c), shall be available to make the payments authorized by section 6(d).

SEC. 5. HOOPA-YUROK SETTLEMENT ROLL.

(a) PREPARATION; ELIGIBILITY CRITERIA. – (1) The Secretary shall prepare a roll of all persons who can meet the criteria for eligibility as an Indian of the Reservation and –

(A) who were born on or prior to, and living upon, the date of enactment of this Act;

(B) who are citizens of the United States; and

(C) who were not, on August 8, 1988, enrolled members of the Hoopa Valley Tribe.

(2) The Secretary's determination of eligibility under this subsection shall be final except that any Short plaintiff determined by the United States Claims Court to be an Indian of the Reservation shall be included on the Settlement Roll if they meet the other requirements of this subsection and any Short plaintiff determined by the United States Claims Court not to be an Indian of the Reservation shall not be eligible for inclusion on such roll.

(b) RIGHT TO APPLY; NOTICE. – Within thirty days after the date of enactment of this Act, the Secretary shall give such notice of the right to apply for enrollment as provided in subsection (a) as he deeds reasonable except that such notice shall include, but shall not be limited to –

(1) actual notice by registered mail to every plaintiff in the Short cases at their last known address;

(2) notice to the attorneys for such plaintiffs; and

(3) publication in newspapers of general circulation in the vicinity of the Hoopa Valley Reservation and elsewhere in the State of California.

Contemporaneous with providing the notice required by this subsection, the Secretary shall publish such notice in the Federal Register.

(c) APPLICATION DEADLINE. -- The deadline for application pursuant to this section shall be established at one hundred and twenty days after the publication of the notice by the Secretary in the Federal Register as required by subsection (b).

(d) ELIGIBILITY DETERMINATION; FINAL ROLL. -- (1) The Secretary shall make determinations of eligibility of applicants under this section and publish in the Federal Register the final Settlement Roll of such persons one hundred and eighty days after the date established pursuant to subsection (c).

(2) The Secretary shall develop such procedures and times as may be necessary for the consideration of appeals from applicants not included on the roll published pursuant to paragraph (1). Successful appellants shall be added to the Settlement Roll and shall be afforded the right to elect options as provided in section 6, with any payments to be made to such successful appellants out of the remainder of the Settlement Fund after payments have been made pursuant to section 6(d) and prior to division pursuant to section 7.

(3) Persons added to the Settlement Roll pursuant to appeals under this subsection shall not be considered in the calculations made pursuant to section 4.

(e) EFFECT OF EXCLUSION FROM ROLL. -- No person whose name is not included on the Settlement Roll shall have any interest in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the

Hoopa Valley Tribe, the Hoopa Valley Reservation, the Yurok Tribe, or the Yurok Reservation or in the Settlement Fund unless such person is subsequently enrolled in the Hoopa Valley Tribe or the Yurok Tribe under the membership criteria and ordinances of such tribes.

SEC. 6. ELECTION OF SETTLEMENT OPTIONS.

(a) NOTICE OF SETTLEMENT OPTIONS. -- (1) Within sixty days after the publication of the Settlement Roll as provided in section 5(d), the Secretary shall give notice by certified mail to each person eighteen years or older on such roll of their right to elect one of the settlement options provided in this section.

(2) The notice shall be provided in easily understood language, but shall be as comprehensive as possible and shall provide an objective assessment of the advantages and disadvantages of each of the options offered. The notice shall also provide information about the counseling services which will be made available to inform individuals about the respective rights and benefits associated with each option presented under this section. It shall also clarify that on election the Lump Sum Payment option requires the completion of a sworn affidavit certifying that the individual has been provided with complete information about the effects of such an election.

(3) With respect to minors on the Settlement Roll the notice shall state that minors shall be deemed to have elected the option of section 6(c), except that if the parent or guardian furnishes proof satisfactory to the Secretary that a minor is an enrolled member of a tribe that prohibits members from enrolling in other tribes, the parent or guardian shall make the election for such minor. A minor subject to the provisions of section 6(c) shall, notwithstanding any other law, be deemed to be a child of a member of an Indian tribe regardless of the option elected pursuant to this Act by the minor's parent. With respect to

minors on the Settlement Roll whose parent or guardian is not also on the roll, notice shall be given to the parent or guardian of such minor. The funds to which such minors are entitled shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such person including all interest accrued.

(4)(A) The notice shall also establish the date by which time the election of an option under this section must be made. The Secretary shall establish that date as the date which is one hundred and twenty days after the date of the publication in the Federal Register as required by section 5(d).

(B) Any person on the Settlement Roll who has not made an election by the date established pursuant to subparagraph (A) shall be deemed to have elected the option provided in subsection (c).

(b) HOOPA TRIBAL MEMBERSHIP OPTION. – (1) Any person on the Settlement Roll, eighteen years or older, who can meet any of the enrollment criteria of the Hoopa Valley Tribe set out in the decision of the United States Court of Claims in its March 31, 1982, decision in the Short case (No. 102-63) as "Schedule A", "Schedule B", or "Schedule C" and who –

(A) maintained a residence on the Hoopa Valley Reservation on the date of enactment of this Act;

(B) had maintained a residence on the Hoopa Valley Reservation at any time within the five year period prior to the enactment of this Act; or

(C) owns an interest in real property on the Hoopa Valley Reservation on the date of enactment of this Act,

may elect to be, and, upon such election, shall be entitled to be, enrolled as a full member of the Hoopa Valley Tribe.

(2) Notwithstanding any provision of the constitution, ordinances or resolutions of the Hoopa Valley Tribe to the contrary the Secretary shall cause any entitled person electing to be enrolled as a member of the Hoopa Valley Tribe to be so enrolled and such person shall thereafter be entitled to the same rights, benefits, and privileges as any other member of such tribe.

(3) The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982, decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63).

(4) Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Yurok Indian Reservation or the Yurok Tribe or in the Settlement Fund.

(c) YUROK TRIBAL MEMBERSHIP OPTION. – (1) Any person on the Settlement Roll may elect to become a member of the Yurok Tribe and shall be entitled to participate in the organization of such tribe as provided in section 9.

(2) All persons making an election under this subsection shall form the base roll of the Yurok Tribe for purposes of organization pursuant to section 9 and the Secretary shall determine the quantum of "Indian blood" if any pursuant to the criteria established in the March 31, 1982, decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63).

(3) The Secretary, subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended *(25 U.S.C. 1407)*, shall pay to each person making an election under this subsection, $ 5,000 out of the Settlement Fund for

those persons who are, on the date established pursuant to section 6(a)(4), below the age of 50 years, and $ 7,500 out of the Settlement Fund for those persons who are, on that date, age 50 or older.

(4) Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except to the extent authorized by paragraph (3), in the Settlement Fund. Any such person shall also be deemed to have granted to members of the Interim Council established under section 9 an irrevocable proxy directing them to approve a proposed resolution waiving any claim the Yurok Tribe may have against the United States arising out of the provisions of this Act, and granting tribal consent as provided in section 9(d)(2).

(d) LUMP SUM PAYMENT OPTION. – (1) Any person on the Settlement Roll may elect to receive a lump sum payment from the Settlement Fund and the Secretary shall pay to each such person the amount of $ 15,000 out of the Settlement Fund: Provided, That such individual completes a sworn affidavit certifying that he or she has been afforded the opportunity to participate in counseling which the Secretary, in consultation with the Hoopa Tribal Council or Yurok Transition Team, shall provide. Such counseling shall provide a comprehensive explanation of the effects of such election on the individual making such election, and on the tribal enrollment rights of that persons children and descendants who would otherwise be eligible for membership in either the Hoopa or Yurok Tribe.

(2) The option to elect a lump sum payment under this section is provided solely as a mechanism to resolve the complex litigation and other special circumstances of the Hoopa Valley Reservation and the tribes of the reservation,

and shall not be construed or treated as a precedent for any future legislation.

(3) Any person making an election to receive, and having received, a lump sum payment under this subsection shall not thereafter have any interest or right whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, or the Yurok Tribe or, except authorized by paragraph (1), in the Settlement Fund.

SEC. 7. DIVISION OF SETTLEMENT FUND REMAINDER

(a) Any funds remaining in the Settlement Fund after the payments authorized to be made therefrom by subsections (c) and (d) of section 6 and any payments made to successful appellants pursuant to section 5(d) shall be paid to the Yurok Tribe and shall be held by the Secretary in trust for such tribe.

(b) Funds divided pursuant to this section and any funds apportioned to the Hoopa Valley Tribe and the Yurok Tribe pursuant to subsections (c) and (d) of section 4 shall not be distributed per capita to any individual before the date which is 10 years after the date on which the division is made under this section: Provided, however, That if the Hoopa Valley Business Council shall decide to do so it may distribute from the funds apportioned to it a per capita payment of $ 5,000 per member, pursuant to the Act of August 2, 1983 (*25 U.S.C. 117a* et seq.).

SEC. 8. HOOPA VALLEY TRIBE; CONFIRMATION OF STATUS.

The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

Appendix F

SEC. 9. RECOGNITION AND ORGANIZATION OF THE YUROK TRIBE.

(a) YUROK TRIBE. – (1) Those persons on the Settlement Roll who made a valid election pursuant to subsection (c) of section 6 shall constitute the base membership roll for the Yurok Tribe whose status as an Indian tribe, subject to the adoption of the Interim Council resolution as required by subsection (d)(2), is hereby ratified and confirmed.

(2) The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; *25 U.S.C. 461* et seq.), as amended, is hereby made applicable to the Yurok Tribe and the tribe may organize under such Act as provided in this section.

(3) Within thirty days (30) after the enactment of this Act the Secretary, after consultation with the appropriate committees of Congress, shall appoint five (5) individuals who shall comprise the Yurok Transition Team which, pursuant to a budget approved by the Secretary, shall provide counseling, promote communication with potential members of the Yurok Tribe concerning the provisions of this Act, and shall study and investigate programs, resources, and facilities for consideration by the Interim Council. Any property acquired for or on behalf of the Yurok Transition Team shall be held in the name of the Yurok Tribe.

(b) INTERIM COUNCIL; ESTABLISHMENT. – There shall be established an Interim Council of the Yurok Tribe to be composed of five members. The Interim Council shall represent the Yurok Tribe in the implementation of provisions of this Act, including the organizational provisions of this section, and subject to subsection (d) shall be the governing body of the tribe until such time as a tribal council is elected under a constitution adopted pursuant to subsection (e).

(c) GENERAL COUNCIL; ELECTION OF INTERIM COUNCIL. – (1) Within 30 days after the date established pursuant to section 6(a)(4), the Secretary shall prepare a list of all persons eighteen years of age or older who have elected the Yurok Tribal Membership Option pursuant to section 6(c), which persons shall constitute the eligible voters of the Yurok Tribe for the purposes of this section, and shall provide written notice to such persons of the date, time, purpose, and order of procedure for the general council meeting to be scheduled pursuant to paragraph (2) for the consideration of the nomination of candidates for election to the Interim Council.

(2) Not earlier than 30 days before, nor later than 45 days after, the notice provided pursuant to paragraph (1), the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe on or near the Yurok Reservation, to be conducted under such order of procedures as the Secretary determines appropriate, for the nomination of candidates for election of members of the Interim Council. No person shall be eligible for nomination who is not on the list prepared pursuant to this section.

(3) Within 45 days after the general council meeting held pursuant to paragraph (2), the Secretary shall hold an election by secret ballot, with absentee balloting and write-in voting to be permitted, to elect the five members of the Interim Council from among the nominations submitted to him from such general council meeting. The Secretary shall assure that notice of the time and place of such election shall be provided to eligible voters at least fifteen days before such election.

(4) The Secretary shall certify the results of such election and, as soon as possible, convene an organizational meeting of the newly-elected members of the Interim Council and shall provide such advice and assistance as may be necessary for such organization.

(5) Vacancies on the Interim Council shall be filled by a vote of the remaining members.

(d) INTERIM COUNCIL; AUTHORITIES AND DISSOLUTION. – (1) The Interim Council shall have no powers other than those given to it by this Act.

(2) The Interim Council shall have full authority to adopt a resolution –

(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this Act, and

(ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act, and

(iii) to receive grants from, and enter into contracts for, Federal programs, including those administered by the Secretary and the Secretary of Health and Human Services, with respect to Federal services and benefits for the tribe and its members.

(3) The Interim Council shall have such other powers, authorities, functions, and responsibilities as the Secretary may recognize, except that any contract or legal obligation that would bind the Yurok Tribe for a period in excess of two years from the date of the certification of the election by the Secretary shall be subject to disapproval and cancellation by the Secretary if the Secretary determines that such a contract or legal obligation is unnecessary to improve housing conditions of members of the Yurok Tribe, or to obtain other rights, privileges or benefits that are in the long-term interest of the Yurok Tribe.

(4) The Interim Council shall appoint, as soon as practical, a drafting committee which shall be responsible, in consultation with the Interim Council, the Secretary and members of the tribe, for the preparation of a draft

constitution for submission to the Secretary pursuant to subsection (e).

(5) The Interim Council shall be dissolved effective with the election and installation of the initial tribe governing body elected pursuant to the constitution adopted under subsection (e) or at the end of two years after such installation, whichever occurs first.

(e) ORGANIZATION OF YUROK TRIBE. – Upon written request of the Interim Council or the drafting committee and the submission of a draft constitution as provided in paragraph (4) of subsection (d), the Secretary shall conduct an election, pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 *(25 U.S.C. 461* et seq.) and rules and regulations promulgated thereunder, for the adoption of such constitution and, working with the Interim Council, the election of the initial tribal governing body upon the adoption of such constitution.

SEC. 10. ECONOMIC DEVELOPMENT.

(a) PLAN FOR ECONOMIC SELF-SUFFICIENCY. – The Secretary shall –

(1) enter into negotiations with the Yurok Transition Team and the Interim Council of the Yurok Tribe with respect to establishing a plan for economic development for the tribe; and

(2) in accordance with this section and not later than two years after the date of enactment of this Act, develop such a plan.

(3) upon the approval of such plan by the Interim Council or tribal governing body (and after consultation with the State and local officials pursuant to subsection (b) of this section), the Secretary shall submit such plan to the Congress.

(b) CONSULTATION WITH STATE AND LOCAL OFFICIALS REQUIRED. -- To assure that legitimate State and local interests are not prejudiced by the proposed economic self-sufficiency plan, the Secretary shall notify and consult with the appropriate officials of the State and all appropriate local governmental officials in the State. The Secretary shall provide complete information on the proposed plan to such officials, including the restrictions on such proposed plan imposed by subsection (c) of this section. During any consultation by the Secretary under this subsection, the Secretary shall provide such information as the Secretary may possess, and shall request comments and additional information on the extent of any State or local service to the tribe.

(c) RESTRICTIONS TO BE CONTAINED IN PLAN. -- Any plan developed by the Secretary under subsection (a) of this section shall provide that --

(1) any real property transferred by the tribe or any member to the Secretary shall be taken and held in the name of the United States for the benefit of the tribe;

(2) any real property taken in trust by the Secretary pursuant to such plan shall be subject to --

(A) all legal rights and interests in such land existing at the time of the acquisition of such land by the Secretary, including any lien, mortgage, or previously levied and outstanding State or local tax;

(B) foreclosure or sale in accordance with the laws of the State pursuant to the terms of any valid obligation in existence at the time of the acquisition of such land by the Secretary; and

(3) any real property transferred pursuant to such plan shall be exempt from Federal, State, and local taxation of any kind.

(d) APPENDIX TO PLAN SUBMITTED TO THE CONGRESS. – The Secretary shall append to the plan submitted to the Congress under subsection (a) of this section a detailed statement –

(1) naming each individual and official consulted in accordance with subsection (b) of this section;

(2) summarizing the testimony received by the Secretary pursuant to any such consultation; and

(3) including any written comments or reports submitted to the Secretary by any party named in paragraph (1).

SEC. 11. SPECIAL CONSIDERATIONS.

(a) ESTATE FOR SMOKERS FAMILY. – The 20 acre land assignment on the Hoopa Valley Reservation made by the Hoopa Area Field Office of the Bureau of Indian Affairs on August 25, 1947, to the Smokers family shall continue in effect and may pass by descent or devise to any blood relative or relatives of one-fourth or more Indian blood of those family members domiciled on the assignment on the date of enactment of this Act.

(b) RANCHERIA MERGER WITH YUROK TRIBE. – If a majority of the adult members of any of the following Rancherias at Resighini, Trinidad, or Big Lagoon, vote to merge with the Yurok Tribe in an election which shall be conducted by the Secretary within ninety days after the date of enactment of this Act, the tribes and reservations of those rancherias so voting shall be extinguished and the lands and members of such reservations shall be part of the Yurok Reservation with the unallotted trust land therein held in trust by the United States for the Yurok Tribe: Provided, however, That the existing governing documents and the elected governing bodies of any rancherias voting to merge shall continue in effect until the election of the Interim Council pursuant to section 9. The Secretary shall publish in

the Federal Register a notice of the effective date of the merger.

(c) PRESERVATION OF LEASEHOLD AND ASSIGNMENT RIGHTS OF RANCHERIA RESIDENTS. – Real property on any rancheria that merges with the Yurok Reservation pursuant to subsection (b) that is, on the date of enactment of this Act, held by any individual under a lease shall continue to be governed by the terms of the lease, and any land assignment existing on the date of the enactment of this Act shall continue in effect and may pass by descent or devise to any blood relative or relatives of Indian blood of the assignee.

SEC. 12. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL. – Section 4(c) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" *(16 U.S.C. 460ss-3)* is amended –

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "14"; and

(B) by inserting at the end thereof the following new paragraphs:

"(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the Tribe,

"(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is organized upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is organized".

(b) <*16 USC 460ss-3 note*> SPECIAL RULE. – The initial term of the representative appointed pursuant to section 4(c) (11) and (12) of such Act (as added by the amendment made

by subsection (a)) shall be for that time which is the remainder of the terms of the members of the Task Force then serving. Thereafter, the term of such representatives shall be as provided in section 4(e) of such Act.

SEC. 13. TRIBAL TIMBER SALES PROCEEDS USE.

Section 7 of the Act of June 25, 1910 (36 Stat. 857; *25 U.S.C. 407)* is amended to read as follows:

"SEC. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; *25 U.S.C. 413)*, the proceeds of the sale shall be used –

"(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or

"(2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.".

SEC. 14. LIMITATIONS OF ACTIONS; WAIVER OF CLAIMS.

(a) Any claim challenging the partition of the joint reservation pursuant to section 2 or any other provision of this Act as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to *28 U.S.C. 1491* or *28 U.S.C. 1505*, in the United States Claims Court.

(b)(1) Any such claim by any person or entity, other than the Hoopa Valley Tribe or the Yurok Tribe, shall be forever barred if not brought within the later of 210 days from the date of the partition of the joint reservation as provided in section 2 or 120 days after the publication in the Federal

Register of the option election date as required by section 6(a)(4).

(2) Any such claim by the Hoopa Valley Tribe shall be barred 180 days after the date of enactment of this Act or such earlier date as may be established by the adoption of a resolution waiving such claims pursuant to section 2(a)(2).

(3) Any such claim by the Yurok Tribe shall be barred 180 days after the general council meeting of the Yurok Tribe as provided in section 9 or such earlier date as may be established by the adoption of a resolution waiving such claims as provided in section 9(d)(2).

(c)(1) The Secretary shall prepare and submit to the Congress a report describing the final decision in any claim brought pursuant to subsection (b) against the United States or its officers, agencies, or instrumentalities.

(2) Such report shall be submitted no later than 180 days after the entry of final judgment in such litigation. The report shall include any recommendations of the Secretary for action by Congress, including, but not limited to, any supplemental funding proposals necessary to implement the terms of this Act and any modifications to the resource and management authorities established by this Act. Notwithstanding the provisions of *28 U.S.C. 2517*, any judgment entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report.

APPENDIX G

THE EFFICACY OF THE 1873 COEUR D'ALENE EXECUTIVE ORDER

by

E. Richard Hart

Hart West & Assoc.

July 19, 1997

VOLUME I

Prepared for the United States Department of Justice
United States v. Idaho, Civil #92-35703

Hart Exhibit 1189

Appendix G

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Part II: Executive Orders Affecting Indian Reservations, 1855-1902

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.
>
> Article IV, Section 2,
> United States Constitution

One objective of this study was to determine whether or not Congress has either directly or indirectly authorized the executive branch of the government to issue executive orders establishing Indian reservations, and if so, to what extent that authority could be efficacious in conveying permanent title to lands, including submerged lands. Given the Constitution's plain language regarding Congressional power over the public lands, in order to show authority granted to the executive branch, it would seem to be necessary to establish clearly where Congress may have conveyed authority to the president. This is made especially important given the fact that between 1855 and 1919, twenty-three million acres of land were set aside by executive order for Indian reservations.[167]

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[167] Strickland, Rennard, ed., *Felix S. Cohen's Handbook of Federal Indian Law, 1983 Edition* (Charlottesville, VA: The Michie Company, 1982), pp. 495-499. [1251]

Appendix G

Between 1902 and 1927, Charles J. Kappler compiled lists of executive orders that affected Indians in the United States.[168] Kappler's work has been widely cited as authority for historical conclusions about executive orders affecting Indians.[169] However, in the past Kappler's work has not been adequately scrutinized by historians. In the course of the present study, Kappler's work was studied and all executive orders between 1855 and 1927 were analyzed (see Appendix I).[170] The following is a summary of pertinent findings.

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[168] Kappler, Charles J. (compiler and editor) *Indian Affairs: Laws and Treaties,* Vol. IV (Laws compiled to March 4, 1927). Government Printing Office: Washington, 1904, pp. 1001-1053. [1216]

Kappler, Charles J. (compiler and editor) *Indian Affairs: Laws and Treaties,* Vol. III (Laws compiled to December 1, 1913). Government Printing Office: Washington, 1913, PP. 667-695. [1217]

Kappler, Charles J. (compiler and editor) *Indian Affairs: Laws and Treaties,* Vol. I (Laws compiled to December 1, 1902). Government Printing Office: Washington, 1904, pp. 801-936. [1218]

[169] For instance see:

Prucha, Francis Paul. *American Indian Treaties: The History of a Political Anomaly.* University of California Press: Berkeley, 1994, p. 329-333. [1239]

Others clearly relied on Kappler in reaching conclusions. See, for instance:

Wilkinson, Charles E. *American Indians, Time, and the Law.* Yale University Press: New Haven, 1987; pp. 63-68 and 179. [1324]

Cohen, Felix S., *Handbook of Federal Indian Law, with Reference Tables and Index,* Department of the Interior, Office of the Solicitor (Washington, DC: GPO, 1943), pp. 299-302. [1196]

[170] Watkins, Marilyn P. "Appendix I: Executive Orders Concerning Indian Reservations: Summary by Reservation," Hart West & Assoc.; June 4, 1997. [1189]

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Between 1855 and 1927 four hundred eighteen executive orders were issued affecting Indian Reservations (see Table 1). Executive orders were issued by every president holding office between 1853 and 1929 (see Table 2). Executive orders affecting Indian reservations were issued in sixty-three out of seventy-two years between 1855 and 1927. Orders establishing or expanding reservations that continue to exist today were issued in fifty-five out of the seventy-two years. Only eight orders enlarging or establishing existing reservations were made between 1888 and 1899 and none between 1894 and 1899 (see Table 3).

Twenty states were affected by reservations established by executive orders, including every state west of the Rocky Mountains: Arizona, California, Colorado, Florida, Idaho, Kansas, Nebraska, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Many of the executive orders had express legislation authorizing; e.g., the act of June 4, 1906 that empowered the president to extend the trust period on allotment patents, and which authorized at least sixty-two different executive orders (see Table 4). A large number of the executive orders in Kappler's compilations do not make any conveyance of land or rights to Indians. A group of executive orders were issued by President Taft in order to correct the boundaries of several national forest reserves, which had improperly included Indian lands (see Table 5). Other executive orders set aside lands for military posts, schools, churches and government administrative activities (see Table 6). Congress also passed legislation authorizing the president to consolidate tribes on reservations (see Table 7). Seventy-one of the four hundred eighteen executive orders revoked earlier reservations or restored Indian lands to the public domain, and thus are not of concern here (see Table 8).

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Another eighteen orders made by the president established or enlarged reservations that were later abolished and no longer exist, and for that reason are not of interest here (see Table 9). In 1919 Congress passed an act prohibiting the executive from establishing executive orders "except by act of Congress." Eleven orders occurred after 1919 (see Table 10). Of the remaining executive orders establishing or enlarging Indian reservations, fifteen were for Mission Indians, for whom it must be concluded, as the court reasoned in Donnelly v. US (28 US 243), that Congress provided a continuing authority to the executive throughout the period (see Table 11). That leaves, of the original four hundred eighteen, a total of one hundred eighty-seven presidential orders that either establish or enlarge reservations that continue to exist today (see Table 12).[171] The following table summarizes the types of executive orders.

Executive Order Type	Number
Orders making trust extensions on allotment patents	62
Orders dealing with military posts, churches, schools, and government	37
Orders correcting improper forest service boundaries	11
Orders consolidating tribes on reservations	3
Orders revoking reservations or restoring land to the public domain	71
Orders establishing or enlarging reservations that no longer exist	21

[171] Many of the executive orders were of multiple purposes. If any of the purposes was to establish or enlarge a reservation that exists today, that order was included in this list.

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Orders establishing or enlarging Mission reservations (1855-1902)	15
Orders establishing or enlarging reservations that continue to exist	187
Orders after 1919 establishing or enlarging reservations that continue to exist	11
Total Executive Orders	418

The important focus for this study, thus must be on the one hundred eighty-seven orders (other than the Mission orders) that establish or enlarge reservations that continue to exist. The study must be limited in one further way, however. Probably because of the Lone Wolf decision, Kappler ceased providing congressional authority for executive orders after his first volume, which ended in 1902. It is not within the scope of the present study to examine the legislative history dealing with each of the reservations affected by executive orders between 1903 and 1918. However, of the seventy-four orders issued during this period, authority is easily identified for half (see Table 13). An examination of the authority for each order between 1855 and 1918 has been summarized in the following table.

Years	Total Number	Number with individual congressional authority
1855-1871	23	22
1871-1887	77	58
1887-1902	13	9
1903-1918	74	37
Totals	187	126

As stated above, the major focus of this study must be on the period from 1855 to 1902.

An examination of those one hundred thirteen orders is illuminating. Between 1855 and 1871, the period from the

beginning of the use of executive orders to set aside reservations until the end of treaty-making, congressional authority for individual executive orders is clear in all but one anomalous case, Shoalwater, a small, three hundred acre reserve, established in part to preserve the peace, and which may have been set aside by the president in his capacity as Commander-in-Chief. During the period from 1871 to 1887, from the end of treaty-making to the passage of the Dawes Act, Congressional policy called for the executive to set aside reservations, pending congressional action. The orders were considered a temporary measure until Congress dealt with each one. Even so, fifty-seven of the seventy-seven orders had individual congressional authority. In 1887, Congress made them all permanent with the General Allotment Act. During the period following the General Allotment Act, and up to and including the year 1902, the year before the Lone Wolf decision, there were only thirteen orders establishing or enlarging reservations, of which nine had individual authority.

Years	Total Number	Number with individual congressional authority
1855-1871	23	22
1871-1887	77	58
1887-1902	13	9
Totals	113	89

Court decisions and other factors help to explain many of the twenty-four orders without clear individual authority. In the adjudication of *U.S. v. W.R. Irrigation District* (1939) the court found that the Walker Lake Reservation was legally set aside by the General Land Office in 1859, which would likely also establish the legality of the establishment of the Pyramid Lake Reservation.

Fort Stanton was established on May 4, 1855, to help the military control the Mescalero Apache. Although briefly

occupied by Confederate troops during the Civil War, it was reoccupied and rebuilt by the United States military in 1868, during the war of extermination against the Apaches and Navajos. An unratified treaty with the Mescaleros led to the establishment of a reservation in association with Fort Stanton in 1873.

Under terms of the Treaty of Guadalupe Hidalgo, of February 2, 1848, the United States agreed to recognize Indian title to lands that had previously been recognized by Spain and Mexico. This probably not only authorized, but required the United States to set aside the reservations established for Zuni and Nambe, and Hopi; and may well have provided the same authorization for Havasupai, Walapai, and perhaps Jicarilla.

Although Kappler does not list the April 29, 1868, Fort Laramie Treaty (15 Stat. 635-647) with the Sioux as authorization for the order enlarging the Pine Ridge Reservation, Congress almost certainly believed that the president had the authority.

The General Allotment Act provided ratification to all orders prior to 1887, giving them a uniform and permanent title. These orders included all of the remaining orders establishing or enlarging existing reservations between 1855 and 1887, including Havasupai, Fort Berthold, Spokane, Turtle Mountain, Walapai, Kickapoo, Iowa, Jicarilla, Northern Cheyenne and Chehalis. Since Fort Berthold and Northern Cheyenne had been made permanent by the Dawes Act, the two post-1887 orders were likely also efficacious under that act.[172]

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[172] Many other sources were consulted during the preparation of this section and the attached tables. They include:

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It becomes clear that Congress did indeed act to authorize and to ratify executive orders establishing or enlarging reservations. In fact, there are really only five

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(continued from previous page)

Frazer, Robert W. *Forts of the West.* University of Oklahoma Press: Norman, 1965, pp. 103-104. [1202]

Sonnichsen, C. L. *The Mescalero Apaches.* University of Oklahoma Press: Norman, 1973, p. 89. [1248]

Madsen, Brigham D. *The Lemhi: Sacajawea's People.* Caxton Printers: Caldwell, Idaho; 1979, pp. 112-118,186-189 and 197-203. [1226]

Minge, Ward Alan. *Ácoma: Pueblo in the Sky.* University of New Mexico Press: Albuquerque, 1991, pp. 57-58. [1230]

McKinney, Whitney. *A History of the Shoshone-Paiutes of the Duck Valley Reservation.* Institute of the American West and Howe Brothers: Salt Lake City, 1983, pp. 19-22. [1229]

Johnson, Edward C. "Walker River," *Numa: A Northern Paiute History.* Inter-Tribal Council of Nevada: Reno, 1976, p. 96. [1215]

Inter-Tribal Council of Nevada. *Numa: A Northern Paiute History.* Inter-Tribal Council of Nevada: Reno, 1976, pp. 65-66. [1213]

Nelson, Byron, Jr. *Our Home Forever: A Hupa Tribal History.* Hupa Tribe: Hoopa, California, 1978, pp. 187-197. [1231]

Ruby, Robert H. and John A. Brown. *A Guide to the Indian Tribes of the Pacific Northwest.* Norman: University of Oklahoma Press, 1986, pp. 125-126 and 161. [1245]

Hart, E. Richard. "Boundaries of Zuni Land: With Emphasis on Details Relating to Incidents Occurring 1846-1946," expert testimony submitted to the United States Court of Claims, Docket 161-79L, March 1980, Vol. 1, pp. 91-93 and Vol. 2, p. 89. [1208]

Hart, E. Richard. "The Zuni Mountains: Chronology of an Environmental Disaster," expert testimony submitted to the United States Claims Court, Dockets 327-81L and 224-84L, September 11, 1988, pp. 67 and 126-132 [1209]

Steen, Harold K. *The U. S. Forest Service: A History.* University of Washington Press: Seattle, 1977, pp. 34-37, 101-102 and 324-325. [1249]

anomalous orders without clear individual authority: one between 1855 and 1871 and four between 1887 and 1902 (see Table 15). Even so, the titles to all executive order reservations were ratified, made permanent, and made uniform with statute and treaty reservation titles with the Dawes Act of 1887.

APPENDIX H

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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Reservation	
UNITED STATES OF AMERICA, Plaintiff, Counterdefendant	Case No. 94-0328-N-EJL
and	
COEUR D'ALENE TRIBE, Plaintiff in Intervention,	UNITED STATES' POST-TRIAL BRIEF

counterdefendant in Intervention)

vs.

STATE OF IDAHO,

Defendant.

Appendix H

UNITED STATES' POST-TRIAL BRIEF

COMES NOW the Plaintiff, United States, and, pursuant to the Oral ORDER of December 12, 1997, herewith files its POST-TRIAL BRIEF.

I. INTRODUCTION

At the conclusion of the trial the Court requested further discussion with regard to the impact of the General Allotment Act, 24 Stat. 388, 25 U.S.C. §§ 331 et seq commonly referred to as the "Dawes Act" on the issue of the permanency of the 1873 Executive Order. Other questions involving the efficacy and meaning of the 1873 Executive Order have already been extensively briefed (see PLAINTIFF, UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANT, STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT,[1] filed August 8, 1997, and addressed at trial, and the United States continues to stand on those urgings. This brief will deal only with the issue as framed above and to which the Court requested additional briefing at the conclusion of the trial.

II. FACTUAL BACKGROUND

1. End of Treaty-Making

Due to a shift in congressional policy towards Indians, Congress in 1871 declared that "hereafter no Indian nation or tribe within the territory of the United States may contract by treaty." Indian Appropriation Act of March 2, 1871, 16 Stat. 566. "The Act of 1871 resulted from the

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[1] By this reference the United States incorporates its BRIEF IN OPPOSITION TO DEFENDANT, STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT as if set forth verbatim herein.

opposition of the House of Representatives to its practical exclusion from any policy role in Indian affairs." Antoine v Washington, 420 U.S. 194, 202 (1975). When Congress thus ended treaty-making with tribes it determined that reservations were to be henceforth created by executive order. During the period from 1871 to 1887 Congress considered such executive orders to be temporary until such time as Congress ratified, rejected or amended these orders. When Congress appropriated funds to the Indian Department, under the President, to be used to carry out actions necessary to achieve its goals in Indian policy, the funds carried with them the authority to set aside such reservations as might be necessary by executive order. E. Richard Hart, "The Efficacy of the 1873 Coeur d'Alene Executive Order, Hart West & Assoc., July 19, 1997, Vol. I, pp. 1-26, 83; hereinafter "Hart Executive Order Report," (Exhibit 1189).[2]

Executive orders were seen as the instruments to carry out congressional policy. Reservations set aside by executive order were capable of containing anything the Congress might conceive as necessary to the survival of the tribe and to meet whatever public exigency that prompted the establishment of the reservation in the first instance. (Id.).

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[2] The "Hart Executive Order Report," Exhibit 1189, should not be confused with the larger, three-volume report-in-chief, "A History of the Coeur d'Alene Tribe's Claim to Lake Coeur d'Alene," July 15, 1996, Exhibit 1439. The former, "Executive Order Report," commissioned approximately one year after the latter, main report, deals with, inter alia, the very issue now before the Court. For a more detailed discussion of these very maters appropriate references to that "Executive Order Report" will be afforded. Such references, of course, include all exhibits cited in that report as well.

2. 1871-1887, From the End of Treaty-Making to the Dawes Act

After the end of treaty-making in 1871 the use of executive orders to establish and modify Indian reservations increased dramatically. (Id., p. 26)[3] As noted, until ratified by a congressional act, these reservations were considered temporary and subject to abolishment, either by the Executive or by Congress. The "temporary" nature of these orders contributed in a significant fashion (see infra) to the change in federal Indian policy during the next 16 years culminating with the Dawes Act in 1887.

The end of treaty-making, however, did nothing to change the necessity of extinguishing Indian title in order to allow non-Indian settlement in the West. (Id., p. 27). Thus, the United States was forced with the difficult task of first, gaining cession of aboriginal territory from tribes in the West whiled in return, granting them only a "temporary" title to their reservation.[4]

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[3] From 1871 to 1887 over 150 executive orders affecting Indians reservations were signed by the President. (Id.).

[4] Despite the pressing need to extinguish Indian title, Congress strengthened the disclaimer wording in territorial acts, further guaranteeing there would not be settlement on Indian lands until Indian title had been extinguished. Wording that had been added to the Idaho territorial act in 1863, was extended to all territories in the Revised Statutes of 1873-1874:

> "... Nothing in this Title contained shall be construed to impair the rights of person or property pertaining to the Indians in any Territory, so long, as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any State or territory; but all

By the mid-1870s a growing trend towards the dual notions of allotment along with permanent title was becoming evident. (Hart Executive Order Report, pp. 32-38). Influential writers of the time noted the unsatisfactory tenure by which most executive order Indian tribes held their lands. (Id., pp. 34-38). By the early 1880s two themes--making Indian reservation titles permanent and establishing a general allotment policy--dominated the debate about Indian policy. (Id., p. 39). The stage was set for the great debate over allotment. (Id.).[5]

Throughout the early 1880s numerous bills were introduced offering varying forms of allotment,[6] and the debate continued. (Id., pp. 40-49). During the debates "(i)t was becoming clear to Congress that severalty, as envisioned, could not take place unless tribes had permanent title." (Id., p. 44). Multiple questions of inter alia, polygamy,

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> such territory shall be excepted our of the boundaries, and constitute no part of any territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular Territory.

United States Congress, Revised Statutes, 3rd Congress. 1st Session, 1873-1874, pp. 325-326; Hart Executive Order Report, pp. 28-29; emphasis added to indicate the new language.

[5] In the 1880 annual report of the Commissioner of Indian Affairs, the Commissioner noted:

> "In former annual reports of this office attention was drawn to the importance of securing to the Indians a uniform and perfect title to their lands, as a measure conducive in the highest degree to their present and future welfare.

Commissioner of Indian Affairs, Annual Report, pp. xvi-xviii, Exhibit 1303. Hart Executive Order Report, pp. 39-40.

[6] See e.g. HR 6268 (Hart Executive Order Report, p. 32); S 1777, (Id., p. 31); S 1773 (Id., p. 43); S 1598 (Id., p. 40); S 1509 (Id.).

tribal membership, inheritance, lands in "excess" of allotment, remainders, etc. all begged the question of the necessity in the first instance of a permanent title in the name of the tribe. (Id., p. 44). The issue to title to Indian lands continued to be tied to the allotment issue. (Id., p. 45).

By late 1885 and early 1886 "the subject of the permanency of title and executive order reservations came up during the debate and discussion. Senator Dawes, the author of the Allotment Act, did not want to include executive order reservations as equal to statute or treaty reserves, a position he would maintain until the House/Senate conference finally overcame his objection two years later." (Id., pp. 50, 52).[7] Indeed, much of the ensuing congressional debate would focus on this issue culminating with the elevation of the executive order reservations to an equal level in the final legislation. (Id., pp. 50, 50-52).

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[7] Dawes stated:

> "Now, I want to show you a feature of the bill which has struck some with alarm. There are three kinds of -titles: First, A treaty title; Second, A statute title; and third, a reservation under an executive title. A statute title is one created by statute since we passed a law that there should be no more treaties made. It is another name for the treaty title. This bill provides that, in all cases, bands and tribes, either by virtue of treaty stipulations, or by act of Congress, shall have this patent. It is confined to these two. The title by executive order, is not included here, because the title by executive order is created by the President's will, and can be modified tomorrow, or extinguished altogether. Therefore, the Indians have no interest in it, but the title by treaty and statute is a title by purchase."

Hart Executive Order Report, p. 50.

During the debates, opponents to Dawes' two-tiered approach successfully argued that the potential permanence of any allotment, be it derived from a treaty, statute, or executive order reservation, would stem from the original title by which the reservation as a whole was held. By subordinating executive order reservations to statute or treaty reservations in this regard would only exacerbate the problem by preventing any uniform approach towards "civilizing" Indians. Allotment in severalty, they continued, could only progress if all tribal title to lands was made uniform and permanent. (Id., pp. 53-54).

Dawes finally agreed and acknowledged that the Allotment Act as finally written would treat executive order reservations on an equal basis as with treaty and statute reservations, all three types of reserves being equally recipient to full and permanent title (Id., pp. 53-54). The final senate version, as authored by Dawes, thus put tribes on executive order reservations on exactly the same status as were tribes on treaty and statute reservations, all three now being considered equally vested with a material interest in the title to their reservation. Under this policy, all Indian lands were could not be allotted, there being no difference in reservation status. (Id., p. 55).

On the House side the most important proposed amendment was a late-December, 1887 demand to strike from the Senate Version the very Dawes' proposed provision calling for treating statute and treaty reservations differently from executive order reservations. In the House amendment a single section would replace the two-tiered approach, and provide for treatment of all three forms of reservations in the exact same way. (Id., p. 58). Since the issue had already been extensively debated on the Senate side culminating in the same conclusion to treat all three forms of reservations equally there was little, if any, opposition to the House's proposed amendment. (Id., p. 60). As a result, what would

eventually become the single section ensued in the form of 25 U.S.C. § 331. On January 26, 1887, the General allotment Act was signed in both the Senate and the House, and on February 8 signed by the President and became law.[8]

3. Contemporaneous Interpretation of the Allotment Act

This same thought was echoed in the Commissioner of Indian Affairs Annual Report for 1890, where, after noting that of the 162 existing Indian reservations, 56 had been established by authority of executive order without specific authority, he recounted the importance of the passage of the Dawes General Allotment Act of 1887 to executive order reservations, further explaining how that importance related to the Coeur d'Alene Tribe's lands.

> *Reservations by Executive Order.*--Of the fifty-six established by executive order, the title has not been held to be permanent, but the lands has been subject to restoration to the public domain at the pleasure of the President. Under the general allotment act, however, of 1887 (24 Stats., p. 388), the tenure has been materially changed and all reservations, whether established by

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[8] As finally written, the Act stated in pertinent part:

> "In all cases where any tribe...has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause...the same or part thereof to be surveyed...and to cause allotment..."

25 U.S.C § 331.

> Executive order, act of Congress, or treaty, are held to be permanent.
>
> The permanency of this tenure is further shown by the act of Congress authorizing and directing the Secretary of the Interior to negotiate with the Coeur d'Alene tribe of Indians in Idaho for the purchase and release of a portion of their reservation which was established by executive order...

Commissioner of Indian Affairs, Annual Report 1890, pp. iii-vi, xxii-xxxi (Exhibit 1313. Emphasis added).[9]

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[9] It was the tribal material interest in their reservations, invested with them by the Dawes Act, which prompted the Commissioner of Indian Affairs thought as expressed in his Report for 1891:

> "They should be protected in the permanent possession of all this land necessary for their own support, and whatever is taken from them should be paid for at its full market value." (Emphasis added).

Commissioner of Indian Affairs Annual Report for 1891, pp. 9-43, Exhibit 1314, Hart Executive Order Report, p. 65.

This same thought was again noted in 1902 in the Bureau of American Ethnology, Exhibit 1253, pp. 641-643, which provided the government's view of official tribal cessions. It was explained that prior to 1887 the method of establishing reservations had "not been uniform, some being by treaty, some by executive order, or others by Act of Congress. Those established by executive order, independent of an act of Congress, were not held to be permanent before the "general allotment act" of 1887, under which, quoting the Commissioner of Indian Affairs, "the tenure has been materially changed and all reservations, whether by Executive order, act of Congress, or treaty, are (now) held permanent." (Hart Executive Order Report, p. 66).

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In the Commissioner of Indian Affairs Annual Report for 1892 (Exhibit 1315, pp. 64-73) the Commissioner reported on the progress of the ongoing allotment process, noting that

> "No allotments have been made on the Coeur d'Alene Reservation as the Indians have thus far been opposed to them, although they are doubtless fully qualified to own land in severalty."

Allotment, of course, was not actually implemented upon the Coeur d'Alene reservation until 1906, 34 Stat. 335, at which time tribal members who lived near the Lake and river shores were forced to take allotments away from the shores. Exhibit 1439, p. 274.

4. Judicial Interpretation

It is evident that in 1887 when Congress passed the General Allotment Act it made title to all executive order reservations including the Coeur d'Alene Reservation completely uniform in statute with statute and treaty reservations. Less than three weeks after the signing of the Act, the Attorney General of the United States delivered an Opinion to the Secretary of the Interior referring to the President's "power to declare permanent reservations for Indians to the exclusion of others on the public domain." (18 U.S. Op. Atty. Gen. 557, 559, Exhibit 1203, emphasis added).

In Ex Parte Wilson, 140 U.S. 575, 576-577 (1891) the Supreme Court stated:

> "The White Mountain Indian Reservation was a legally constituted Indian reservation. True, when the territory of Arizona was organized...there was no such reservation; and it was created in the first instance by order of the President...Whatever doubts

> there might have been, if any, as to the validity of such executive orders, are put to rest by the act of Congress of February 6, 1887, (Dawes Act)... The necessary effect of this legislative recognition was to confirm the executive order, and establish beyond challenge the Indian title to this reservation."

See also Cohen, Handbook on Federal Indian Law, 1982 ed., pp. 493-499, 495 wherein the Allotment Act is cited as an example of where in "...a number of statutes Congress has acted affirmatively to assure that executive order reservations are treated like all other recognized tribal lands."

Similarly, Gibson v. Anderson, 131. F. 39, 41 (9th Cir., 1904) quoting McFadden v. Mountain View Mining & Milling Company, 97 F. 610 (9th Cir., 1899) stated:

> "There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose and was to exclude all intrusion upon the territory thus reserved by any and every person other than the Indians for whose benefit the reservation was made..."[10]

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[10] Although not on the issue as framed by the Court (viz: what is the effect, if any, of the Dawes Act upon the permanency of the 1873 Executive Order, a neighboring state court during this time had no difficulty in finding that, owing to a disclaimer provision similar to that of state of Idaho, certain badlands could be conveyed to a tribe prior to statehood, by

Other decisions of the Supreme Court echo the basic thought that an executive order reservation was to considered as equal in statute to that of a treaty-based reservation. Antoine, supra, 420 U.S. at p. 201 wherein the Court stated:

> "A legislated ratification of an agreement between the Executive Branch and an Indian tribe is a (law) of the United States...made in pursuance of the Constitution and therefore like "all Treaties made," is made binding upon affected States by the Supremacy Clause."

In an "Opinion" of 1911 the Attorney General, queried about the sale of timber from unallotted lands on an executive order Indian reservation, again citing the Dawes Act as having ratified and made permanent executive order reservations, also concluded that the General Allotment Act of 1857 was an action by Congress that validated executive order reservations. He stated:

> "The necessary effect of this legislative recognition was to confirm the Executive order, and establish beyond challenge the Indian title to this reservation."

29 U.S. Op. Atty. Gen. 239, 241 (Exhibit 1221. p. 14).

It should be noted at this point that not only was the Coeur d'Alene Executive Order ratified in this more general way by the Allotment Act of 1887, but it was also ratified by Congress specifically. As noted in more detail in the

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virtue of an executive order. Jones v. Calvert, State Land Com'rs., 73 P. 701, 32 Wash. 610 (S.Ct. Wash., 1903).

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UNITED STATES' BRIEF IN OPPOSITION TO IDAHO'S MOTION FOR SUMMARY JUDGMENT, pp. 50-52, the Agreement of 1887, 26 Stat. 989, concluded with the Tribe formally ceding its former aboriginal holdings for $150,000 and the promise that their 1873 Executive Order reservation would remain in their possession forever. (Hart Executive Order Report, p. 92). The 1887 Agreement was contingent, however, upon ratification by Congress, and Congress was by this time anxious to obtain an additional cession of at least a portion of the 1873 Executive Order reservation. On January 23, 1888, when a Senate resolution was introduced pointedly asking if

> "Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River and about 20 miles Of the navigable part of the Saint Joseph river... are embraced within this reservation...and whether it is advisable to release any of the navigable waters aforesaid from the limits of said reservation"

United States Senate, Resolution, 50th Congress, 1st Session (1888) Exhibit 214) Senator Dawes himself responded:

> "...I will say that recent legislation (Dawes Act) has authorized the Secretary to do that very thing whenever in his opinion it is beneficial to the Indians. All that is a matter of enactment now, so that without coming to Congress for that purpose the Secretary of the

> Interior can initiate any negotiation suggested by the resolution."[11]

That is to say, with the prior, general ratification of all Executive order reservations, including, of course, the Coeur d'Alene reservation (see Commissioner of Indian Affairs 1890 Annual Report, supra), title to such reservations had now been made permanent and in all other respects equal in stature to treaty-made reservations. As a result, not only could allotment now take place but, more importantly at that moment for both the United States and the Coeur d'Alene Tribe, such valid, recognized title could now be followed by additional cessions for eventual non-Indian settlement. This was perfectly consistent, of course, with one of the salient objectives of the Allotment Act to allow for the eventual sale of all Indian lands in excess of allotment to non-Indians.

Finally, Idaho may seek to invoke the decision in Sioux tribe of Indians v. United States, 316 U.S. 317 (1942) for the proposition that "tribes residing on executive order reservations are tenants at the will of the government who hold a mere temporary and cancelable possessory right." Idaho's Brief in Support of its Motion for Summary Judgment, p. 8). Idaho's assertion, if made, would be misplaced.[12]

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[11] The Secretary, of course, responded in no uncertain terms that "the reservation appears to embrace all of the navigable waters of lake Coeur d'Alene." Exhibit 213. Later in the session the resolution was passed. (Hart Executive Order Report, pp. 92-93).

[12] As noted throughout this POST-TRIAL BRIEF, the approximate 400-page Hart Executive Order Report, Exhibit 1189, consists of two volumes, and cites to aproximately 227 separate exhibits, containing over two thousand pages. Included in those exhibits are over 50 official United States documents and another 50 statutes. Over 300 pagers of

First, in a rather narrow decision Sioux held that revocation of the unratified executive order reservations involved did not require compensation. Sioux, supra, 315 U.S. at 331. The case, it should be noted, arose in the Court of Claims under a restrictive jurisdictional statute to hear claims for money damages for the alleged taking of the tribe's property rights. Second, Sioux merely sustained the revocation of certain, small executive order reservations which had been created only two years prior to their revocation, and had been intended solely to serve as temporary buffer zones against liquor traffic between reservation and non-reservation lands. Sioux, supra at pp. 319-322. It seems unlikely that such an anomaly as put forth in Sioux could provide help in this instant matter.[13]

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congressional testimony are produced from over 12 years of successive congresses. This is the first time such a comprehensive legislative history of the Dawes Act has been produced. It was not available to the Sioux Court when it rendered its opinion and where the Court cited to only four pages of the entire congressional history of the Act to support its decision.

[13] Moreover, Sioux based its conclusions regarding the effect of the Allotment Act on what proved to be a faulty factual premise involving the Colville Reservation. More specifically, Sioux pointed to an 1892 Senate Report on a bill to abolish a portion of the Colville Reservation as the basis for its conclusion that the Allotment Act did not amount to recognition of tribal ownership of the lands prior to allotment. Sioux, supra, 316 U.S. at pp. 329-330. First, such post-Dawes Act, 1892 Senate Report is not legislative history of that Act, coming, as it did, five years after the passage of the Allotment Act. Second, the Sioux decision remains at odds with the McFadden opinion, supra, which dealt specifically with the Colville Reservation and which reached an opposite factual conclusion. Third, and apparently unbeknownst to the Sioux Court, with regard to the Colville matter the commissioner of Indian Affairs subsequently complained that the 1892 Congress had taken "this new position" regarding the tribe's interest in ownership of its reservation. (Commissioner of Indian Affairs, "Annual Report," 1892, Exhibit 253). As a result, Congress finally rectified this very error, which had been relied

Third, the decision does not attend to the issue of the efficacy of an executive order reservation to retain the badlands of the navigable waters within its orders. The decision stands only for the proposition that an unratified executive order reservation creates no permanent rights. But, pursuant to the Agreement of 1887, supra, of course, the 1873 Executive Order reservation was specifically authorized and ratified by Congress, thereby distinguishing the Sioux decision in this case.

In sum, as Cohen, Handbook on Federal Indian Law, supra, states:

> "(Sioux)...involved special circumstances. In many instances the case remains an anomaly. The reservations in question had been created only a few years prior to their revocation, and had been intended to serve only as temporary buffer zones against liquor traffic between reservation and non-reservation lands. It seems unlikely that the same result would be reached involving a permanent executive order reservation of long duration." Cohen, supra, at p. 495. Cohen, supra, at p. 495.

See e.g. Arizona v. California, 373 U.S. 546, 598 (1963) wherein the Court stated:

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upon in Sioux. That is, in an act passed in 1906 Congress recognized the Colville Tribe's vested interest in the northern half of their reservation, which had been opened to non-Indian settlement in 1892, and paid the tribe $1.5 million, as had been called for their 1891 agreement with the United States. (34 Stat. 245-246).

> "Some of the reservations of Indians here involved were made almost 100 years ago...In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well...We can give but short shrift at this date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."

III. CONCLUSION

As previously argued, and acknowledged by Idaho during the trial, the 1873 Executive Order was deemed by virtually all of the parties to have then been and to remain "presently effective." Moreover, as argued by the United States, the 1873 Executive Order was also specifically ratified and made permanent by the Agreement of 1887. Viewed in this context, the efficacy, if any, of the Dawes Act upon the 1873 Executive Order is not the sine qua non for a favorable decision for the United States. Yet, even the Allotment Act, as demonstrated above, supports the inexorable conclusion that the 1873 Executive Order was ratified and made permanent in a timely fashion.

Respectfully submitted this 13TH day of January, 1998.

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Appendix H

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 1998, I caused to be served true and correct copies of the foregoing UNITED STATES' POST-TRIAL BRIEF, by U.S. Mail, postage prepaid, to the following counsel:

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